

***COMPENDIUM OF
GRIEVANCE
ARBITRATION
DECISIONS
1984***

Nova Scotia



**Department of
Labour**

Research Division

COMPENDIUM OF GRIEVANCE ARBITRATION DECISIONS
1984

NOVA SCOTIA DEPARTMENT OF LABOUR
RESEARCH DIVISION

HONOURABLE BRIAN YOUNG
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TABLE OF CONTENTS

Foreword	ii
1. Listing of Grievance Arbitration Decisions, 1984	1
2. Subject Index, 1978 - 1984	103
3. Employer & Union Index, 1978 - 1984	123
4. Brown & Beatty Topical Code Index, 1978 - 1984	143

FOREWARD

This publication is the sixth summary of grievance arbitration decisions (awards) produced by the Nova Scotia Department of Labour. The decisions listed are those which have been filed in accordance with amendments to the Trade Union Act effective May 1978. On occasion summaries of arbitrations outside the jurisdiction of Nova Scotia have been included. They are by no means representative of all arbitration cases outside the jurisdiction of the Nova Scotia Trade Union Act and have been included as a matter of general interest. Subsequent to this date, summaries of grievance arbitration decisions have been prepared and released in the publication Monthly Summary of Activities, Industrial Relations Division, Labour Relations Board. Further arbitration awards received by the department will continue to appear in the above publication.

Appeals of arbitration decisions made to the Supreme Court of Nova Scotia do not necessarily get filed with the Nova Scotia Department of Labour and Manpower. Results of appealed decisions are received on an an hoc basis and are reported as they arrive.

Part 1 of this publication lists grievance arbitration awards by decision number. All indices are retrospective to include the years 1978 through 1984. For summaries of decisions previous to 1984 it is necessary to refer to the appropriate issue for that year. Indexation of arbitration awards is based on Canadian Labour Arbitration by Donald J. M. Brown and David M. Beatty (Agincourt: Canada Law Book Co., 2nd ed., 1984).

Copies of decisions will be made available to interested parties upon request and will be subject to a nominal charge for reproduction. Inquiries relating to the enclosed can be directed to the Nova Scotia Department of Labour, Research Division, Library, P. O. Box 697, Halifax, Nova Scotia, B3J 2T8 (Phone: 424:4313).

Jean Dobson
Director

Research Division
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Halifax, Nova Scotia
1985

PART 1

LISTING OF GRIEVANCE ARBITRATION DECISIONS, 1984

DECISION: 84-01

Nova Scotia Power Corporation AND International Brotherhood of Electrical Workers, Local 1928.

Judge J. A. MacLellan, Arbitrator

Gerald J. McConnell, for the union
Gregory North, for the employer
January 3, 1984

ISSUES: Compensation - Overtime Work 8:2130; Collective Agreement - The Object of Construction: The Intention of the Parties 4:2100.

CIRCUMSTANCES: This group grievance demanded clarification of an article of the Collective Agreement which dealt with the return to work of employees after working unplanned overtime.

The Union contended that, according to the wording of the Article, an employee was entitled to time off with pay if he worked the specified overtime hours.

The Employer contended that an employee must work a portion of that overtime between specified hours.

AWARD: The grievance succeeds. The Arbitrator found the Article to be unambiguous and clear in supporting the Union's interpretation.

DECISION: 84-02

Bowater Mersey Paper Company Limited AND The Canadian Paperworkers Union, Local 141

Judge J. A. MacLellan, Arbitrator

Denis Grant, for the union
J. T. MacQuarrie, Q.C., and John Plowman, LLB, for the employer
January 3, 1984

ISSUES: Organization and Direction of the Workplace - The Requirement of Bona Fides 5:2300; Organization and Direction of the Workplace - Express Prohibitions in the Agreement 5:2200; Organization and Direction of the Workplace - Revision of Classification and Rate 5:2440.

CIRCUMSTANCES: Because of changes over a period of time in one phase of the Company's operations, the Employer had transferred several employees involved in that phase into another job with different responsibilities. The new job was a classification with a lower salary and arrangements were made to phase the employees into the lower rate of pay over a one-year period.

The Union maintained that the Company was acting in bad faith, transferring the employees so they need pay a lower salary, not because that phase of operations had changed substantially. They also argued that the former classification was a negotiated part of the Collective Agreement (part of a schedule appended thereto) and could not be unilaterally changed.

AWARD: The grievance fails. The Arbitrator found that operations had changed significantly over a period of time and that the Employer had acted in good faith. He upheld management's right to abolish the classification which was now redundant.

DECISION: 84-03

Piercey Supplies Limited AND Teamsters, Chauffeurs, Warehousemen, Helpers and Miscellaneous Workers, Local 927

Judge J. A. MacLellan, Arbitrator

Robert Melanson, for the union
Jim McCulloch, for the employer
January 3, 1984

ISSUES: Discipline - Lateness 7:3140; Discipline - Employer Conduct - Discrimination 7:4414; Discipline - Penalties for Work Related Misconduct - Warnings, Suspensions, Discharge 7:3542.

CIRCUMSTANCES: The Grievor alleged that he was unjustly dismissed and requested reinstatement with all wages and benefits.

The Employer dismissed the Grievor under the Collective Agreement for repeated instances of absenteeism or lateness after being warned both orally and in writing.

The Union argued that the Employer was unduly harsh because another employee with a worse record of tardiness had been disciplined by a one-day suspension.

AWARD: The grievance succeeds in part. The Arbitrator found that the Employer had the right to discharge the employee in the situation. However, similar cases must be treated in like fashion. Because another employee had been disciplined by suspension only, the Grievor was ordered reinstated to be given another chance. There was to be no reimbursement for lost wages or benefits and a copy of the Award was to be placed in the Grievor's personnel file.

AUTHORITIES: Brown and Beatty: Canadian Labour Arbitration, pp. 378-379.

DECISION: 84-04

J. W. Lindsay Enterprises Ltd. AND The Labourers' International Union of North America, Local 615

Judge J. A. MacLellan, Arbitrator

Bill McInnes, Q.C., for the employer
Ronald A. Pink, for the union

ISSUES: Organization and Direction of the Workplace - Assignment of Bargaining Unit Work to Non-Unit Employees 5:1400; Collective Agreement - The Object of Construction: Intention of the Parties 4:2100.

CIRCUMSTANCES: The Union grieved that construction site work that should have been done by Union members under the terms of the Collective Agreement with the Construction Association Management Labour Bureau Limited, was done by a non-unionized sub-contractor and by the owners of the Company.

Under the Trade Union Act, this Collective Agreement applies to all employers, whether or not they belong to the Bureau. The Company argued that the sub-contracting of the work was not an issue between employer and employee as envisaged by the Act.

The Union maintained that the sub-contracting of work which was work within the jurisdiction of the Union, using non-union employees was a matter of interest between the Union and the Company and therefore a matter over which the Bureau has jurisdiction to negotiate.

AWARD: The grievance succeeds. The Arbitrator found the evidence to be clear that the work performed by non-union workers was bargaining unit and clearly within the jurisdiction. Nothing in the Trade Union Act prohibits the Bureau from negotiating terms and conditions in the Collective Agreement which may affect third parties (i.e. sub-contractors). If the Bureau could not enter into such agreements, any non-Bureau member could sub-contract work to third parties and ignore the provisions of the Collective Agreement.

The Company was ordered to pay to the Union for the hours of work performed by the non-union employees.

DECISION: 84-05

The Letter Carriers' Union of Canada AND The Canada Post Corporation

Innis Christie, Arbitrator

William Findlay, for the union
Heidi Levenson Polowin, for the employer
January 4, 1984

ISSUES: Grounds for Discipline - Alcoholic Beverages or Drugs 7:3560;
Grounds for Discipline - Employee Disability 7:3200; Ground for Discipline
- Innocent Absenteeism 7:3210; Jurisdiction of the Arbitrator - Time Limits
2:3128.

CIRCUMSTANCES: The grievor was dismissed on the basis of the large number of sick days he had accumulated within a given time period. It was acknowledged that the grievor was an alcoholic. Upon being given the position of letter carrier which he had held previous to his dismissal, he had undertaken to master his alcohol problem or resign. Subsequent to this, he had taken a leave of absence to undergo a rehabilitation program. Upon his return to work, he followed a one-year mandatory aftercare program and following an investigation, entered into a "Conditions for Continued Employment with Canada Post" contract which was binding on the Union and the grievor. Under this contract, the grievor's job was secure in relation to his drinking problem if he did not breach any of the conditions which included a close monitoring of attendance and a medical certificate for any sick leave.

The Union argued that the grievor's absences were the result of bona fide illnesses and therefore not a breach of conditions. The Employer countered that even if the absences were not a breach of conditions, the grievor was justifiably terminated for innocent absenteeism. Also at issue was whether the Employer had made its final decision with respect to the grievor's termination within the specified time period following suspension and whether certain personnel documents were permissible evidence.

AWARD: The grievance succeeds in part. The Arbitrator specified which documents were permissible and indicated that the Employer acted within the time period. After extensively considering the authorities for breach of the "Conditions for Continued Employment ... " and the right of an employer to discharge an employee for innocent absenteeism, the Arbitrator found that at the date of termination there was not a breach of the "Conditions ... " since the absences were for valid medical reasons and not because of alcohol problems. However, there was ample basis for the Employer's conclusion that the grievor's record was not consistent with a good prognosis for future attendance at the time of dismissal. Nonetheless, the Arbitrator felt that, as of the date of the hearing, the Employer was not justified in releasing the grievor since it was probable that his work attendance record could be improved.

The grievor was ordered reinstated in employment with no loss of seniority but with no compensation for pay or other benefits lost as a result of the discharge. He would be subject to "Conditions ... " for two years following the date of the award. In addition, continued employment would be subject to the condition that in any fiscal year absences for medical reasons must not exceed the total number of days agreed upon by the parties in accordance with a formula based on the absences of other letter carriers of the same age in Nova Scotia.

AUTHORITIES: Re Williams (Mitchell; C.U.P.W. Agreement, 1979-unreported); Re Allalouf (Kates; March, 1983; C.P.C. Nos. 82-1-6-35, 36 and 37; unreported); Re Henry (Norman; September 10, 1983; C.U.P.W. No. W-400-GG-20, C.P.C. No. 82-1-3-58; unreported); Canada Post Corporation and Canadian Union of Postal Workers (Potosky grievance) (1982), 6 L.A.C. (3d) 385 (Burkett); Re Hudson (Christie; 1982; C.U.P.W. No. A-24-GG-363, C.P.C. No. 82-1-3-205; unreported); Re Stackhouse (Christie; November 10, 1983; C.P.C. No. 83-1-6-4; L-9-83-01, unreported); Seiberling Rubber Co. of Canada Limited (1969), 20 L.A.C. 267 (Weiler); Massey-Ferguson Limited (1969), 20 L.A.C. 370 (Weiler); Massey-Ferguson Industries Limited (1972), 24 L.A.C. 344 (Shime); Re Bell (Swan; May, 1983; C.P.C. No. 82-1-3-2487, C.U.P.W. No. 0-299-GG-446); City of Sudbury (1981), 2 L.A.C. (3d) 161 (P. Picher)

DECISION: 84-06

Twin Cities Co-Operative Dairy AND Teamsters, Chauffeurs, Warehousemen, Helpers and Miscellaneous Workers, Local 927

Judge J. A. MacLellan, Arbitrator

Ronald Pink, for the union

Donald McDougall, Q.C., and Glen Dexter, for the employer
January 4, 1984

ISSUES: Insubordination 7:3600; Insolent, Unco-operative Behavior, Obscene Language 7:3660; Doctrine of Culminating Incident 7:4310; Use of Prior Record 7:4314; Warnings 7:4416; Rehabilitative Potential 7:4422; Employment Record 7:4420.

CIRCUMSTANCES: The Grievor, a driver-salesman and employee of the Company for 30 years, was discharged following 2 separate incidents roughly one week apart. In the first incident, the Grievor grabbed the front of a fellow worker's shirt; in the second incident, the Grievor was surly with a major customer on his route. The Grievor had a long record of past disciplinary proceedings; including warning letters and suspensions.

AWARD: The grievance fails. The grievor was properly discharged, given his past record, lack of remorse or potential for rehabilitation, and the application of the doctrine of culminating incident.

DECISION: 84-07

Eastern Shore Memorial Hospital AND Nova Scotia Nurses Union

Judge J. A. MacLellan, Chairman; Donald H. McDougall, Q.C.; and Gregory North

David Reynolds, for the union
Eric Durnford, for the employer
January 4, 1984

ISSUES: Promissory Estoppel 2:2200; Past Practice 3:4430; Entitlement to Wages 8:1000; Alteration of Wages 8:1400.

CIRCUMSTANCES: The employer unilaterally changed its method of calculation of the amount of bi-weekly pay. The employee's annual salary was previously divided by 26 to reach the bi-weekly sum, but the hospital decided instead to divide by 26.1. The collective agreement was silent on the method of calculation. However, the union argued that the doctrine of promissory estoppel and past practice applied in its favor.

AWARD: The grievance is dismissed. Past practice and promissory estoppel are not applicable where the collective agreement is silent on the point. The union must be able to point to an express statement of the legal rights which have theretofore not been enforced by the employer. There is none in this collective agreement.

DISSENT: Resort to the doctrines of promissory estoppel and past practice is unnecessary. The collective agreement states that employees are entitled to be paid every second Friday. Since there are 26 such Fridays in any one year, the grievance should be allowed.

AUTHORITIES: Re Hawker Siddley Canada Inc. Trenton Works Division and United Steelworkers of America, Local 1231 (unreported, Nathanson J., S.H. 41305, July 14, 1983).

DECISION: 84-08

City of Dartmouth AND Dartmouth Police Associatio, Local 101 of the Police Association of Nova Scotia.

R. Lorne MacDougall, Q.C., Chairman; Charles MacDougall; Hector McInnes, Q.C.

Bruce W. Evans, for the union
Michael Moreash, for the employer
December 15, 1983

ISSUES: The Object of Construction: Intention of the Parties 4:2100; Fringe Benefits (Long Service Pay) 8:3000.

CIRCUMSTANCES: The collective agreement provided for Long Service pay "to all members annually at the rate of \$120.00 after 10 years of service", such pay to be paid on the 15th day of December of each year. The union argued that the correct interpretation was that immediately upon completion of 10 years of service an employee was entitled to receive \$120.00 in service pay which was to be paid on the following December 15. The employer, on the

other hand, argued that the employee was entitled to only a pro-rated portion of the \$120.00, such portion to be calculated from the 10th anniversary date to the end of December. Thus, for example, a man who completed his 10th year on June 30th would receive 6/12ths of \$120.00, or \$60.00, and the full \$120.00 each year thereafter. Furthermore, argued the employer, although the union was unaware of it, the long-standing past practice of the employer was to pro-rate the service pay for the first year.

AWARD: The grievance fails. The doctrines of estoppel and past practice are not applicable because the union was unaware of the practice. However, looking at the words of the provision, the phrase "at the rate of" carries with it the idea of apportionment. Therefore, the employer was correct when it prorated the service pay.

DISSENT: The service pay is triggered immediately upon the employee's 10th anniversary. It cannot be apportioned. The December 15th date is one of convenience to the employer.

AUTHORITIES: Toronto Harbour Commissioners (1973) 3 L.A.C. (2d) 145 (Hanrahan); The King vs. MacLeod (1912) 4 D.L.R. 491 (BCCA).

DECISION: 84-09

Civil Service Commission AND Nova Scotia Government Employees Union

S. Bruce Outhouse, Arbitrator

Ronald Pink, for the union
Reinhold Endres, for the employer
January 2, 1984

ISSUES: Qualifying for Medical and Disability Benefits 8:3320.

CIRCUMSTANCES: The grievor, a hospital psychiatric attendant, was compelled under the sick leave provisions of the collective agreement and the hospital's policy to produce medical certification covering every day absent due to illness. If no certificate was presented for a particular day, the grievor was simply absent without pay. On the present occasion, the grievor submitted a certificate covering only one of two consecutive days he was ill. The employer refused to pay him for the day not covered and told the grievor to get a certificate for the other day so that he may be paid. The grievor refused, saying that there was no dispute of his illness and the hospital was being unreasonable and overly technical.

AWARD: The grievance fails. The employer had not acted unreasonably in its request for a further certificate for the missing day, even though it would have caused the grievor and his physician some inconvenience.

DECISION: 84-10

Civil Service Commission AND Nova Scotia Government Employees Union

Peter E. Darby, Arbitrator

Ronald A. Pink, for the union
Reinhold M. Endres, for the employer
January 2, 1984

ISSUE: Standard of Proof 3:2500, 7:2500; Fighting, Assault 7:3430;
Proceedings Prior to Arbitration, Delay 7:2100; Burden of Proof 3:2411,
7:2300.

CIRCUMSTANCES: The grievor, a physical education teacher at a school for boys, was alleged to have grabbed and struck in the face a recalcitrant boy who was slow in getting into line. The boy's only injuries were a bruise on the chest and a possible cut lip. The grievor denied hitting the boy in the face and argued that the grabbing of the front of the boy's shirt to move him into line was within the scope of the school's policy on the use of force. Furthermore, the union argued that the standard of proof for the factual findings was somewhere between a balance of probabilities and beyond a reasonable doubt. The employer argued that the grievor in fact struck the boy, such use of force was outside the school's policy, and it was justified in disciplining the grievor by levying a one-day suspension without pay.

AWARD: The grievance is dismissed and the one-day suspension upheld. The standard of proof is the civil one of a balance of probabilities. The arbitrator found as a fact that the grievor struck and grabbed the boy. Such a use of force was outside the policy on the use of force.

The arbitrator, however, criticized the investigation process of the employer because of its delay in beginning its inquiry into the incident, its method of questioning of witnesses, and its failure to meet with relevant staff members involved in the incident.

AUTHORITIES: Brown & Beatty, Canadian Labour Arbitration (1977); E. E. Palmer, Collective Agreement Arbitration in Canada (2nd ed, 1983); Criminal Code, (RSC 1970, c. 34); Re Air Canada (1978) 17 L.A.C. (2d) 337 (Christie); Dalton Cartage Company and St. Paul Fire and Marine Insurance Co. (1982) 40 N.R. 135 (SCC); Bater v. Bater (1950) 2 ALLER 458 (CA); Twin Cities Co-operative Dairy Ltd. (unreported arbitration, November 30, 1982, Outhouse).

DECISION: 84-11

Canso Seafoods Limited AND United Food and Commercial Workers Union, Local 910

F. B. William Kelly, Q.C., Arbitrator

Ronald Pink, for the union
Robert Giannow, for the employer
January 17, 1984

ISSUES: Policy Grievance 2:3124; The Object of Construction: Intention of The Parties 4:2100; Computation of Vacation Pay 8:3230.

CIRCUMSTANCES: This is a policy grievance about vacation pay, which is assessed according to yearly earnings. The company had determined earnings as the amount of income received by an employee during the year, reduced by the amount of vacation pay received during that same year. The union's position is that the calculation of vacation pay should be based on the full earnings as specified in the T-4 form which includes the vacation pay of the previous year in addition to the regular pay.

AWARD: The union's interpretation of earnings is correct as the collective agreement states T-4 earnings for calculation of vacation pay.

DECISION: 84-12

Sydney Steel Corporation AND United Steelworkers of America, Local 1064

F. B. William Kelly, Arbitrator

Paul Grezel, for the union
Gregory North, for the employer
January 19, 1984

ISSUES: Statutes - Applied by Board of Arbitration 2:2100; Skill & Ability - Criteria of Ability & Qualification 5:2420, 6:3300; Proof of Ability 6:3200; Senior Employer With the Required Ability 6:3210.

CIRCUMSTANCES: The grievance results from a dispute as to who should have operated the boiler during a limited shut-down and lay-off at the plant. The company felt there were not enough employees already in the bargaining unit who had the appropriate qualifications to be allowed to work unsupervised, so they transferred several foremen back into the unit; these men were qualified to work on their own. The union claimed there were several men within the unit who were qualified, and they had more seniority than the transferred employees. The company had acted according to their interpretation of the Stationary Engineers Act, and their concern for safety. The problem is that the company and the union disagree as to that class of certificate required by the Act to operate the boiler alone. The union specifies a lower class than the company, in which case they had members available for the work.

AWARD: The company acted according to what they considered statutory requirements and in good faith, but the union's position is correct. Their members with higher seniority than the transferred foremen are to be compensated for loss of pay.

AUTHORITIES: McLeod et al. v. Egal et al. (1974), 46 D.L.R. (3d) 150.

DECISION: 84-12 (supp)

Sydney Steel Corporation AND United Steelworkers of America, Local 1064

F. B. William Kelly, Q.C., Arbitrator

Paul Grezel, for the union
Jamie Campbell, for the employer
April 27, 1984

ISSUES: Improper Lay-offs 2:1425; Lay-off and Recall 3:2415; Splitting the Hearing Between Merits and Remedies 3:2620.

CIRCUMSTANCES: The original decision specified the employees were to receive compensation for loss of pay and other benefits resulting from improper transfers and lay-offs. The parties were unable to reach agreement on the compensation for two of the employees. Employee A. The employer alleged A was given the opportunity to return to work, but refused. A claimed he did not understand the request, but after some checking decided the offer was legitimate and was prepared to return. However, this change in attitude was not made known to the employer and A was not called again to return from lay-off. Employee B. B claimed compensation for the 8 week period he was on lay-off. He had received 5 weeks vacation with pay when the lay-off went into effect. The employer said he was only entitled to 3 weeks compensation as he had been paid for the first 5 weeks.

AWARD: Employee A. The grievance fails because the grievor did not notify the company of his change of attitude and was willing to return to work. Employee B. The grievance succeeds. The grievor would have still received 5 weeks vacation if he had been recalled. He received vacation pay only because he was on lay-off and would have returned to work if recalled.

AUTHORITIES: Firestone Steel Products of Canada and United Automobile Workers, Local 27, Unit 7 (1974), 6 L.A.C. (2d) 18.

DECISION: 84-13

City of Halifax AND The Halifax Civic Workers Union, Number 108.

R. Lorne MacDougall, Q.C., Chairman; Joseph Ross; Eric Durnford

Charles A. MacDougall, for the union
Gerald J. Goneau, for the employer
February 13, 1984

ISSUES: Leave of Absence 7:3120; Innocent Absenteeism 7:3210; Employer Response Other Than Termination 7:3240; The Doctrine of the Culminating Incident 7:4310.

CIRCUMSTANCES: This is a grievance against unjust discharge. The grievor was dismissed for excessive and repeated absenteeism. The employer gave evidence that over the years the grievor had established a pattern of absenteeism by first using his vacation leave a day at a time and then using his sick leave in a similar manner. When his paid leave was exhausted he then took leave without pay. The grievor says most of his absenteeism was the direct result of medical problems and when required, he always produced a medical certificate. For the past few years he had been experiencing domestic problems, and had recently been talking with the employer's occupational health nurse, receiving counselling for those problems and for his pattern of absenteeism. At the time of his dismissal (March 1983) he had not used all his sick leave credits for the year, and his last absence was supported by a certificate from his doctor. He felt that if rehired, he would be able to improve his attendance record.

AWARD: All vacation and sick leave absences can only be taken "as is mutually agreeable" to the employer and employee, implying the employer's compliance with the grievor's behavior as the pattern of absenteeism continued for many years without disciplinary action. The employer could have dismissed him at the end of 1982 but because he was kept on in 1983 he received his full complement of sick leave benefits which he had not yet exhausted. His last absence was legitimately for medical reasons. The grievor is to be reinstated, although with no compensation, on the condition that his absenteeism improves in the next 6 months and is comparable to the average record of others in the bargaining record.

AUTHORITIES: The Nova Scotia Government Employees Association and The Civil Service Commission of the Province of Nova Scotia (1979); Crouse-Hinds Canada Ltd. and United Automobile Workers (1981), 3 L.A.C. (3d) 230; Canada Post Corp. and Canadian Union of Postal Workers (1982), 6 L.A.C. (3d) 385.

DECISION: 84-14

Volvo Canada Ltd. AND International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.), Local 720.

S. Bruce Outhouse, Arbitrator

Larry Scheff, for the union
John Merrick, Q.C., for the employer
January 23, 1984

ISSUES: The Nature of Disciplinary Sanctions 7:4210; The Reasonableness of the Penalty 7:4300; The Doctrine of the Culminating Incident 7:4310.

CIRCUMSTANCES: The grievor is a truck driver who was suspended for 10 days because he failed to meet the employer's standard of production, by not making enough runs per day. The employer noted that previously there had been similar problems, and when a supervisor accompanied the grievor on his run, an acceptable level was reached. He had been given several warnings

and a 2 day suspension prior to this last disciplinary action. The union's position is that the employer did not have proper and sufficient cause to suspend the grievor as there was no direct evidence to prove he had intentionally worked at a slower pace. Nor had the alleged lack of productivity affected the overall production of the plant.

AWARD: The employer was justified in disciplining the grievor as he had habitually failed to meet the standard of production reasonably required by management, even after being repeatedly told of the consequences. Because of his past disciplinary record the suspension was a reasonable response to his behaviour.

AUTHORITIES: Amalgamated Transit Union, Local 508 v. The Metropolitan Transit Commission of Halifax, Dartmouth and the Municipality of the County of Halifax (June 20, 1983) unreported.

DECISION: 84-15

Inverness District School Board AND Canadian Union of Public Employees,
Local 955

Judge J. A. MacLellan, Arbitrator

Ronald Blundon, for the union
Robert Street, for the employer
January 27, 1984

ISSUES: The Scope of the Arbitral Review 6:3100; Ability and
Qualifications Criteria 6:3300.

CIRCUMSTANCES: The grievor is claiming seniority within the bargaining unit as the basis for the grievance. He applied for a position as head janitor but it was given to another applicant who was not in the bargaining unit. There were certain criteria specified for the job and both applicants were assessed accordingly. A minimum standard had been established prior to the interviews. The grievor did not attain the minimum requirements so the job was given to the other candidate, who had met the standard.

AWARD: The arbitrator considered the employer's method of assessment to be fair and reasonable, with no evidence of discrimination against the grievor. If he had met the minimum standard his grievance would have succeeded, but because he did not, management has the right to hire a non-union person.

DECISION: 84-16

Inverness District School Board AND Canadian Union of Public Employees,
Local 955

Judge J. A. MacLellan, Arbitrator

Ronald Blundon, for the union
Robert Street, for the employer
January 27, 1984

ISSUES: The Scope of the Arbitral Review 6:3100; Ability and
Qualifications Criteria 6:3300.

CIRCUMSTANCES: The grievor applied for another position within the
bargaining unit, and it was subsequently awarded to a non-union person. The
employer based its decision on criteria requiring a minimum standard of
ability which the grievor had not met.

AWARD: If the grievor had met the minimum standard he would have been
entitled to the job, but as he did not, and as the employer used a
reasonable standard for assessment, the grievance fails.

DECISION: 84-17

Inverness District School Board AND Canadian Union of Public Employees,
Local 955

Judge J. A. MacLellan, Arbitrator

Ronald Blundon, for the union
Robert Street, for the employer
January 27, 1984

ISSUES: Senior Employee With the Required Ability 6:3210; Ability and
Qualifications Criteria 6:3300.

CIRCUMSTANCES: The grievor was employed as a roofer and applied for a
position as assistant janitor; however the job was given to another employee
with less seniority. The employer offered him a job as janitor for 40 weeks
and roofer for the rest of the year, and said it was because he was highly
valued as a roofer so they didn't want to move him from that job. There was
agreement that he was qualified for the assistant janitor position.

AWARD: The grievance succeeds. The agreement is clear that a union member
with the most seniority is to be given the first option on a position for
which he/she is qualified.

DECISION: 84-18

Texaco Canada Inc. AND Atlantic Oil Workers, Local 1.

W. Brent Cotter, Gregory I. North

December 15, 1983.

ISSUES: Object of Construction 4:2100; Distribution of Work Within the Bargaining Unit 5:2000; Interpretation of "displaced".

CIRCUMSTANCES: The union sought a declaration that the employer's work assignments violated the collective agreement. The employer assigned an employee with an injured leg to less strenuous work normally performed by two other employees. The issue was whether the two other employees had been "displaced" from their jobs although all three employees were within the same job classification.

AWARD: The grievance fails. The interpretation of "displaced" in the context of this collective agreement is that of movement from one classification to another, and not the reassignment of work within the same classification. Assignment of work within a classification is within the company's discretion.

AUTHORITIES: Ford v. Dept. of Water & Power of City of Los Angeles (1935) 41p. (2d) 188, 189 (Calif. App); Re. Brewery Workers, Local 232, and Bradings Cincinnati Cream Brewery Ltd. (1954) 5 LAC 2012 (Laing); Re. CFTO-TV and NABET (1975) 10 LAC (2d) 323 (Brown); Palmer, Collective Agreement Arbitration in Canada, p. 103; Beal's Cardinal Rules of Legal Interpretation, 3rd ed. p. 75.

DECISION: 84-19

Eastern Provincial Airways Ltd. AND International Association of Machinists & Aerospace Workers.

Innis Christie, Arbitrator

G. J. McConnell, for the union
Ralph Farley, for the employer
January 26, 1984

ISSUES: Res Judicata 1:3000; Judicial Review 1:5000; Statutory Requirement For Arbitration 2:1100; Preliminary Objections 3:2100.

CIRCUMSTANCES: Clause 4 in a back-to-work agreement imposed a temporary suspension of seniority rights while the employer returned to normal operations. In addition, the clause prohibited the filing of any grievances as a result of the non-application of the seniority provisions. Regardless, the grievor alleged that a more junior employee was recalled to work prior

to her. At the hearing, the employer made two preliminary objections. The first was that the present grievance was res judicata because a month earlier in an arbitration involving the same employer and union but different grievor, an arbitrator ruled that the grievance was inarbitrable due to Clause 4. Also, a clause in the collective agreement stated that "all decisions arrived at by the arbitrator shall be final and binding on the employee, the union and the company"; and s. 156(1) of the Canada Labour Code provides that every decision of an arbitrator is "final". The second objection was that Clause 4 rendered the grievance inarbitrable.

AWARD: The present grievance was not res judicata because the same employee was not involved in both arbitrations. The "final and binding" clause in the collective agreement is not applicable here because it means that the same grievance cannot be brought again. And s.156(1) of the Canada Labour Code is a privative clause intended to limit judicial review and also has no application here.

That part of Clause 4 which prohibits the bringing of grievances is void because it runs counter to s.155(1) of the Canada Labour Code.

However, the grievance must ultimately fail because Clause 4 has taken away her substantive recall or seniority rights and thus there is no "difference" to arbitrate.

AUTHORITIES: s.156(1)(3) Canada Labour Code; s.155(1) Canada Labour Code; Brown & Beatty, Canadian Labour Arbitration (1977); Re. Canada Safeway Ltd. (1981) 123 DLR (3d) 512 (SCC); 120 DLR (3d) 42 (Alta CA) rev'd; Re. O'Malley Electric Ltd. (1982, NSSC, unreported); Algoma Steel Corp'n Ltd. (1982) 6 LAC (3d) 346 (Brown); Re. EPA (1963) Ltd. (1981) 33 Nfld. & P.E.I.R. 308 (Nfld. S.C., T.D.), appeal dismissed (1982) 39 Nfld. & P.E.I.R. 10 (Nfld. C.A.); Re. City of Halifax (1982) 131 DLR (3d) 426 (NSLA); Cassior Asbestos Corp'n (1975) 1 Can. L.R.B.R. 212 (BC); Re. Ontario Hydro (1983) 147 DLR (3d) 210 (Ont. C.A.); Ontario Public Services Employees' Union (1983) 8 LAC (3d) (Saltman); Metro Toronto Assoc. for the Mentally Retarded (1983) 9 LAC (3d) 58 (Langille).

DECISION: 84-20

New Dawn Guest Home AND Canadian Union of Public Employees, Local 1183.

T. J. K. Gillis, Chairman; Duncan MacLean; Ian Stott

James Crosby, for the union
Frank Elman, Q.C., for the employer
December 16, 1983

ISSUES: Sleeping on Job 7:3570.

CIRCUMSTANCES: The grievor, a nursing home attendant, was dismissed after being found sleeping on the job. The grievor admitted that she had slept before while on duty, but at the time of dismissal this was not known to the employer.

AWARD: The grievance succeeds. This was the grievor's first offence; the employer's subsequent knowledge of other instances cannot constitute justification for the discipline imposed. While remaining awake in a nursing home was important, dismissal here was an excessive penalty and a 6 month suspension was more appropriate.

DECISION: 84-21

Eastern Provincial Airways Limited AND Canadian Air Line Employees' Association.

Innis Christie, Arbitrator

H. F. Caley, for the union
Ralph Farley, for the employer
January 17, 1984

ISSUES: Ordering Costs 2:1430; Adjournments 3:2300; Assignment of Bargaining Unit Work to Non Unit Employees 5:1400; Distribution of Work Within the Bargaining Unit 5:2000; Requirement of Bona Fides 5:2300; Changes in Job Function 5:2410; Procedural Requirements 5:2500.

CIRCUMSTANCES: There were two aspects to this grievance. (a) Prior to the formal hearing, the employer requested and received an adjournment due to conflicting appointments and unavailability of a chief witness. The union claimed it was entitled to counsel fees, lost employee wages, and their travel expenses. The employer agreed only to pay the arbitrator's fees and expenses for the wasted day.

(b) The employer reassigned certain functions which had been performed by telecommunications agents, with the result that 4 out of 5 agents were laid off. The union grieved that the work of the agents laid off had been reassigned contrary to the collective agreement. The union also argued that the employer was in breach of a letter of understanding which stipulated that one of the two locations at Gander is the telecommunications office.

There were 3 aspects of work alleged to have been reassigned: (1) certain telecommunications operations were now carried out by dispatchers in another bargaining unit; (2) the meal ordering function was now carried out by customer sales agents in the same bargaining unit; and (3) non-bargaining unit employees were sending administrative communications outside of the remaining agent's working hours. The employer argued that the reduction of agents and reassignment of their duties was done for economic reasons and in good faith.

AWARD: Without express power in the collective agreement, the arbitrator does not have the power to order that one side pay the costs of the other. The grievance succeeds in part. Clause 2.02 prohibits the company from permitting anyone not covered by the collective agreement to perform any tasks or duties covered by the agreement. Clause 4.05 describes the duties

of the telecommunications agents and, indeed, the dispatchers were carrying out some of those duties. Thus, regardless of the economic inefficiency this may cause to the company, the employer must stop those reassignments. Clause 2.02 does not apply here since the customer agents were within the same bargaining unit. Where the collective agreement contains a job description, the employer still has the right to reassign work between job classifications, provided it is done in good faith and for bona fide economic reasons. Non-bargaining unit employees are not permitted to do the duties of the telecommunications agent on her off hours by virtue of Clause 2.02. Thus, this aspect of the work has been reassigned contrary to the collective agreement.

As for the letter of understanding, it was not applicable here since no amalgamation or removal of office had occurred: there had simply been a drastic reduction in the number of telecommunication agents. So long as the employer observes the seniority provisions, it may lay off as many employees as it wishes.

AUTHORITIES: Palmer, Collective Agreement Arbitration in Canada (1983, 2nd); Imperial School Desks (1963) 13 LAC 289 (Reville); Canron Ltd. (1973) 2 LAC (2d) 273 (H.D. Brown); Brown & Beatty, Canadian Labour Arbitration (1977); Windsor Public Utilities Commission (1974) LAC (2d) 380; Air Canada (1975) 10 LAC (2d) 113; Air Canada (1971) 23 LAC 406; Pacific Western Airlines Limited (unreported, Oct. 15, 1983); Air Canada, formerly Great Lakes Air Lines Ltd. (unreported, Nov. 16, 1981); Eastern Provincial Airways (1963) Ltd. (Apr. 12, 1977, unreported); Eastern Provincial Airways (1963) Ltd. (Aug. 18, 1978, unreported); Eastern Provincial Airways (1963) Ltd. (June 24, 1980, unreported); Algoma Steel Corp. (1968) 19 LAC 236; Joseph Grant Memorial Hospital (1972) 24 LAC 104; R.J. Simpson Manufacturing Co. (Can.) Ltd. (1976) 11 LAC (2d) 145; Haley Industries Ltd. (1978) 18 LAC (2d) 277; Canron Pipe Division (1973) 4 LAC (2d) 326; Kelsey-Hayes Canada Ltd. (1975) 8 LAC (2d) 251; Ex Cell O Corp. of Canada Ltd. (Unrep., Feb. 3, 1982); Toronto Electric Commissioners (Feb. 24, 1983, unrep.); Eastern Provincial Airways Ltd. (Oct. 18, 1982; unrep.).

DECISION: 84-22

Town of Truro AND Canadian Union of Public Employees.

Bruce Outhouse, Chairman; D. H. McDougall, Q.C., Don Clarke

A. K. Cunningham, for the union
D. W. Gruchy, Q.C., for the employer
January 23, 1984

ISSUES: Applications of Estoppel 2:2220; Object of Construction of Collective Agreement 4:2100; Job Posting 5:2520; Applications of Seniority 6:2000; Skill and Ability Requirement 6:3000; Scope of Arbitral Review 6:3100.

CIRCUMSTANCES: The grievor, a backhoe operator with the Water Department, alleged that the employer breached the promotion provisions of the collective agreement. The relevant article stated that seniority "shall be used as a factor determining preference or priority for promotions ...". The union argued that this unusual provision meant that seniority is the determining factor where the senior applicant has the ability to do the job. In the alternative, the grievor's qualifications were equal to the junior man's. Finally, the union argued that the job posting did not contain sufficient details about the job requirements as stipulated by the collective agreement.

AWARD: The grievance is dismissed. From the way in which seniority is treated in other parts of the collective agreement, the promotion article contemplates a competition among applicants. In determining the relevant qualifications for the job, however, the employer must act in an honest and unbiased way and not activated by illwill. The qualifications must be those which a reasonable employer would have reached.

As to the lack of details in the job posting, the union would be estopped from insisting on strict compliance with the relevant clause since it had acquiesced for many years in the form of posting now used by the employer. If the union wished to enforce its rights, it must put the employer on notice.

AUTHORITIES: Brown & Beatty, Canadian Labour Arbitration (1977).

DECISION: 84-23

The Board of Governors of Dalhousie College and University AND The Dalhousie Faculty Association.

Wayne Thistle, Chairman; Victor Catano, Donald McDougall

Gerald McConnell, for the union
Eric Durnford, for the employer
February 10, 1984

ISSUES: Unit Definition in Terms of Employees 5:1120; Foremen and Supervisors 5:1126.

CIRCUMSTANCES: The grievance was brought by the union over the exclusion of a university employee from the faculty association. The employee is an administrator in one of the schools and has a position on the academic staff as part-time lecturer. The collective agreement states that employees whose duties involve 50% or more non-academic administration are excluded from the bargaining unit. The issue then is whether the employee meets this qualification. Evidence was presented about the employee's various job responsibilities and the amount of time spent doing each one. The union compared similar positions throughout the university and suggested positions of this kind were usually included in the bargaining unit. The union also claimed that as a lecturer she is prima facie a member of the association.

The employer argued that academic qualifications for inclusion in the association is based on the primary functions of teaching and research; the lecturing part of her job was secondary in terms of time; and the administrative responsibilities are the main aspect of her job and most are non-academic in nature.

AWARD: After examining each job function individually and ascertaining the times involved, the Board found the employee spent more than 50% of her time in non-academic administration. She met the requirement for exclusion from the faculty association, and the grievance fails.

DISSENT: Catano dissented from the majority on several points. 1. It is not unlikely that someone would be hired for an academic position and then spend their time performing primarily administrative tasks. 2. The position held by the employee was previously done by people who were included in the bargaining unit. 3. The majority based their assessment of academic versus non-academic administration on the "opinion" of a previous incumbent who considered much of the work non-academic. He was a member of the bargaining unit throughout his tenure which implies, through the collective agreement, his work was academic in nature. 4. Exclusion from the bargaining unit is usually because an employee is involved in management and supervisory functions, not because they perform more than 50% non-academic work. To separate academic and non-academic work is not valid as they are integral to each other; one cannot be completed without the other.

DECISION: 84-24

Nova Scotia Civil Service Commission AND Nova Scotia Government Employees Union.

S. Bruce Outhouse, Arbitrator

Ronald Pink, for the union
Reinhold Endres, for the employer
January 30, 1984

ISSUES: Lateness 7:3140; The Doctrine of Culminating Incident 7:4310; Employment Record 7:4428.

CIRCUMSTANCES: The grievance concerns the discharge of an employee because of recurring tardiness for which he previously received warnings and a three day suspension. The union did not dispute his past record but considered the discharge too severe because of extenuating circumstances relating to an illness. It was pointed out there was always an improvement in his behavior when the employer issued warnings. No penalty had been imposed for the last three incidents leading to the dismissal. On two of three occasions the grievor was late because of a chronic medical problem.

AWARD: The union's arguments stand. The grievor is not entirely blameless in respect to the tardiness but the absences were deemed legitimate because of his medical problems. He has a good work record except for the one problem and the judicious use of discipline produced an improvement in the past. The discharge was not justified partly because of that, and also because the employer chose not to discipline the grievor at the time of the final three incidents. The grievance succeeds and the grievor is reinstated.

DECISION: 84-25

Atomic Energy of Canada Ltd. Chemical Division - Glace Bay Heavy Water Plant
AND Energy and Chemical Workers Union, Local 785.

D. J. MacDonald, Chairman; Manning McIntyre; Donald MacDougall

John Kane, for the union
Eric Durnford, for the employer
February, 1984

ISSUES: Distribution of Work Within the Bargaining Unit 5:2000; Promotions, Demotions and Transfers 6:2100; Lay-off 6:2200; Bumping Upwards 6:2340; Management Rights, Transfer 6:2354.

CIRCUMSTANCES: Employees were transferred from different classification areas in the plant to the labour classification which carried a lower rate of pay. The company's position is it could transfer employees according to the management rights clause in the collective agreement. The union claims cutbacks in certain areas of the plant were actually lay-offs within specific classifications, and the collective agreement allows employees to choose between lay-off or transfer. If laid-off, they were entitled to severance pay, and also have the right to bump employees in the transferred area.

AWARD: A lay-off involves a reduction in the work force and must be instituted by the employer. This didn't happen; a transfer occurred as allowed by management rights. As there was no lay-off, bumping rights are not applicable. The grievance was dismissed.

AUTHORITIES: Northern Electric Co. Ltd. (1971), 23 L.A.C. 104.

DECISION: 84-26

Nova Scotia Forest Industries AND Canadian Paperworkers Union, Local 972.

S. Bruce Outhouse, Arbitrator

Dennis Grant, for the union
Eric Durnford, for the employer
February 20, 1984

ISSUES: Work Hours and Shifts 5:3100; Overtime 5:3200.

CIRCUMSTANCES: The question is whether an employee, a day pipefitter, should have been offered a chance to work 4 hours overtime. Day pipefitters work 8 hour shifts and shift pipefitters work 12 hour shifts. If a shift pipefitter is absent a day pipefitter is usually asked to work an extra 4 hours at the end of his normal shift. The grievor had done so for one day and the next day when the regular shift pipefitter was absent again he expected to do the same, but was not asked to remain. The preceding day the grievor had initiated the request for overtime and the supervisor agreed, but the next day the grievor did not ask about overtime and the supervisor said he simply forgot about getting someone to cover for the shift pipefitter. The union claimed the employer is obliged by the collective agreement to inform them of any changes in shifts (which includes absences) and to replace the shift pipefitter. The union also alleged past practice is relevant as the normal procedure is to replace the shift pipefitter whenever he is absent. The employer claimed the collective agreement specified no requirements on replaced shift pipefitters and it is their right to decide when overtime is necessary.

AWARD: The grievance fails. Not replacing the shift pipefitter does not constitute a modification of the shift schedule. The agreement is silent about overtime policy when the shift pipefitter is absent and does not allow for any adjustment by an arbitrator. The overtime policy was meant to deal with the circumstances under which overtime is required, not with its distribution.

AUTHORITIES: Hawker Siddeley Canada Inc. Trenton Works Division and The United Steelworkers of America, Local 1231, (1983), 59 N.S.R. (2d), 29 (Nathanson).

DECISION: 84-27

City of Halifax AND The Halifax Civic Workers', Local 108.

Ronald J. Downie, Q.C., Chairman; Eric Durnford, Ronald Pink

Bruce Evans, for the union
Barry Allen, for the employer
February 15, 1984

ISSUES: Employee Defined 5:1122; Assignment of Bargaining Unit Work to Non-Employees 5:1300, 5:1400.

CIRCUMSTANCES: A Commission, funded by the City, hired employees for a project pursuant to the NEED program funded by the Federal Government. The union claimed the workers were employees of the City that should have been paid union wages, and laid-off members of the bargaining unit compensated for lost hours of work. The City was directly involved as it administered the salaries for the workers, provided supervisory personnel for at least part of the work; and supplied tools and equipment for the project. Assistance from city employees was given only because the Commission had no qualified personnel of its own, and expenses relating to equipment were paid for by the Commission. The land upon which the work was done was in the process of being transferred to the Commission.

AWARD: The grievance fails. Although the appearance is that the workers were employees of the City, the majority was not convinced the union proved the City was prima facie the employer. The Commission bore the expense of the equipment, and supervisory personnel from the City were used to supplement the Commission's personnel. The work would not have been done except through the NEED program and union members would not have worked for the specified wage.

DISSENT: Pink believed the case was proved that the Commission acted as agent for the City. The Commission had the statutory authority to employ people only to "assist the manager" which the NEED workers were not hired to do. Control of the employees was held by the City through the office of the City Manager and his employee, the Acting Executive Director of the Commission, making the City the employer.

AUTHORITIES: University of Manitoba and Association of Employees Supporting Education Services, 10 L.A.C. (3d), 413; Re. Board of Governors of Riverdale Hospital and C.U.P.E., Local 79 (1974), 7 LAC (2d) 40 (Schiff).

DECISION: 84-28

City of Halifax AND Halifax Civic Workers, Local Union Number 108.

Elwin J. MacNeil, Chairman; Joseph Ross; Eric Durnford

Charles MacDougall, for the union
Gerald J. Goneau, for the employer
February 20, 1984

ISSUES: Compensation - Vacation Benefits 8:3200; Jurisdiction of the Arbitrator - Statutes 2:2100; Arbitration Process - Weighing the Evidence 3:5100.

CIRCUMSTANCES: The grievor alleges that he is entitled to two unbroken weeks vacation with compensation equivalent to what he would have received had he worked that time period. He argues that he is entitled to the minimum provisions of the provincial Labour Standards Code, even when they exceed the terms of the Collective Agreement. No evidence was before the board as to the vacation given the grievor.

AWARD: The grievance is dismissed. Because the evidence was of an inconclusive nature, the Board could not determine that the employer had breached the Collective Agreement.

DECISION: 84-29

Highland View Regional Hospital AND The Nova Scotia Nurses' Union,
Highland View Regional Hospital Local.

S. Bruce Outhouse, Chairman; Raymond F. Larkin; Donald H. MacDougall, Q.C.

David P. Reynolds, for the union
Brian G. Johnston, for the employer
February 22, 1984

ISSUES: Compensation - Alteration of Wages 8:1400; Compensation - Wage Guarantees 8:1200; Collective Agreement - Object of Construction: Intention of the Parties 4:2100; Jurisdiction of the Arbitrator - Promissory Estoppel 2:2200; Jurisdiction of the Arbitrator - Applications of Promissory Estoppel 2:2220; Arbitration Process - Past Practice 3:4430.

CIRCUMSTANCES: The Union alleged, by way of a policy grievance, that the Employer breached the wages provisions of the Collective Agreement by not paying the nurses all of their annual salary as specified in the Agreement. When the Employer took over the payroll operations from the bank, they changed the basis by which the bi-weekly pay was calculated. Previously the annual salary was divided by fifty-two weeks. Now, the Employer divided the annual salary by 1958 hours, the number of hours a nurse would work in a fifty-two week period, if she worked seventy-five hours per two week period, plus an additional eight hours to take into account the extra day in a normal year. As a result, each pay was slightly less than previously.

The Union contended the Nurses were annual, salaried employees. It argued that the Collective Agreement was ambiguous in the definition of "annual" and must thus be interpreted in accordance with past practice. Authorities were cited to support the contention that annual salaries may be referable to 52 weeks rather than a full year. In addition the Employer was estopped from unilaterally changing the method of calculating bi-weekly pays since the present Agreement was negotiated on the basis of an implied representation that the previous methods of calculating would be continued.

The Employer contended that the nurses were hourly paid employees. In the absence of ambiguity in the Collective Agreement, past practice could not be admitted as an aid to interpretation. In fact, the nurses had been overpaid, paid for an extra day by the previous formula. The doctrine of estoppel did not apply to the new method of calculation because the Employer did not knowingly permit the previous erroneous practice, there was no detrimental reliance and the doctrine could only be used as a shield, not a sword.

AWARD: The grievance succeeds. The Employer was trying to accomodate a bi-weekly pay schedule to an annual salary entitlement which cannot be done because a year cannot be divided into twenty-six equal parts. The Collective Agreement gave the nurses an annual salary and by the Employer's method of pay, this entitlement was not met. If an annual salary cannot be accomodated within a bi-weekly pay schedule, the Employer must err on the side of the overpayment.

Relying on the authority of a recent Supreme Court Trial decision, the Board felt that it could not deal with the issues of past practice and estoppel since the Collective Agreement was silent on the method of calculating pays.

The Employer was ordered to compensate each nurse to the extent necessary to bring her to the respective annual salary entitlement.

ADDENDUM: Mr. Larkin considered it unnecessary to deal with the issue of past practice and estoppel to settle the grievance. He felt that the Supreme Court decision should be confined to the very narrow set of facts with which it dealt.

DISSENT: Mr. McDougall would dismiss the grievance. He pointed to various aspects in the Collective Agreement which indicated that it governed a year of 52.1 weeks. That being so, the Employer correctly calculated the bi-weekly pay.

Mr. McDougall felt that the majority erred in law in stating that the nurses were guaranteed the annual salary specified in the schedule, in the absence of specific language to that effect in the Collective Agreement.

AUTHORITIES: Re. Lynwood and Norwood Auxiliary Hospitals and Canadian Union of Public Employees, Lo als 1043 and 1158 (1973), 2 LAC (2d) 337 (Lefsrud); Nova Scotia Nurses' Union, Kentville Hospital Local, and The Valley Health Services Association (April 6, 1983), unreported (Outhouse); Hawker Siddeley Canada Inc., Trenton Works Division v. United Steelworkers of America, Local 1231 (1983), 59 N.S.R. (2d) 29 (Nathanson); Brown & Beatty: Canadian Labour Arbitration, p. 408-409; Palmer: Collective Agreement Arbitration in Canada (2d ed), p. 627; International Union of United Brewery, Flour, Cereal, Soft Drink & Distillery Workers of America, Local 232 and Canadian Breweries Transport Limited 3 LAC 999.

DECISION: 84-30

Kingston Construction Limited AND United Brotherhood of Carpenters & Joiners of America, Local 83.

S. Bruce Outhouse, Arbitrator

Allan Rodgers, for the union
E. W. Colton, for the employer
March 7, 1984

ISSUES: Organization and Direction of the Workplace - Assigning Bargaining Unit Work to Non-Unit Employees 5:1400; Arbitration Process - Past Practice 3:4430; Collective Agreement - Extrinsic Evidence 4:2250.

CIRCUMSTANCES: The grievance was filed on the basis of the articles in the Collective Agreement between the Union and the Construction Association Management Labour Bureau dealing with the recognition of the craft jurisdictions of the Union and the procedure to be followed in the case of a jurisdictional dispute.

A dispute arose between the Carpenters Union and the Labourers' Union as to whose jurisdiction was the removal of the forms used in the pouring of concrete on the Employer's construction site. If the form material was to be reused, it was the Carpenters' work, if not, the Labourers', according to a 1949 Memorandum of Agreement between the international unions. Following submissions from both Unions, the Employer gave the work to the Labourers.

The Carpenters' Union maintained that the prerequisite site meeting to resolve the dispute was not held and that the Procedural Rules and Regulations of the National Joint Board for Settlement of Jurisdictional Disputes was not followed.

The Employer argued that a meeting was not practical and that it had followed the National Procedural Rules which provided for assignment on the basis of past practice if no agreement existed. The Employer said that there was ambiguity regarding reuse since the type of form being used would be dismantled with only the component wood, not the form itself being reused; hence it was not covered by the agreement. In relying on past practice, assignment was given to the Labourers.

AWARD: Although the Employer was in technical violation of the Agreement by not holding the site meeting, the Arbitrator agreed it would not have served useful purpose. However, he found that the Employer failed to make the work assignment in agreement with the National Procedural Rules. The difficulties of interpretation were not an insurmountable obstacle to the application of the Memorandum. The most plausible interpretation of the Memorandum was to determine whether the base materials, i.e. the wood, not the form, would be reused. Therefore, the Employer was too quick to ignore the Memorandum and rely on past practice.

DECISION: 84-31

Canada Post Corporation AND Canadian Union of Postal Workers

Innis Christie, Arbitrator

R. A. Pink, for the union
Ross Dumoulin, for the employer
February 24, 1984

ISSUES: Organization and Direction of the Workplace - Temporary, Casual and Part-time Employees 5:1124; Arbitration Process - Weighing the Evidence 3:5100; Organization and Direction of the Workplace - Overtime 5:3200.

CIRCUMSTANCES: The Union, representing thirty-nine grievors, alleges that on each shift in respect of which a grievance was filed, high mail volume necessitated the working of extra hours and the Employer used casual employees without first offering the extra work to regular employees, contrary to the Collective Agreement. Replacement casualls were assigned to the Halifax postal station, mostly during the evening shift. The casualls were sufficiently and firmly ensconced that management could post weekly work schedules showing rotation days off, as for regular employees. The Union argued that employment of such casualls meant "constructive" high mail volume which therefore should be extra work for regular employees.

AWARD: The arbitrator considered extensively the authorities dealing with constructive high mail volume, the distinction between replacement casualls and the relationships between the articles of the Collective Agreement dealing with the high mail volume situation, staffing and work force. Based

on this consideration, the grievance fails. The use of casuals in and of itself did not demonstrate a high mail volume situation as provided for in the Collective Agreement. Such a situation existed only if the casuals were not legitimately replacing regular employees. Whether or not that was so could not be determined on the evidence given so the arbitrator retained jurisdiction to reconvene at the request of either party to hear further evidence and argument.

AUTHORITIES: Beaulieu, File No. 166-2-3000-3011 (1978), unreported (Doucet); Re. Beaulieu, (1979), 28 N.R. 340 (Fed. C.A.); Cholette, File Nos. 166-2-4259, 61, 63-5, 67 and 68; Re. Manitoba Food and Commercial Workers Union, Local 832 and Canada Safeway Ltd. (1981), 123 D.L.R. (3d) 512; Re. Manitoba Food and Commercial Workers Union, Local 832 and Canada Safeway Ltd. (1981), 120 D.L.R. (3d) 42; Parnham (1982) C.U.P.W. No. W-410-GG 583-605, C.P.C. No. 82-1-3-513-35, unreported (Norman); Jacques, November 30, 1982, unpublished (Bird), File No. 169-2-272, April 24, 1979 (Clarke); Hynes, (1983), C.U.P.W. No. A-6-GG-82, C.P.C. No. 82-1-3-390; Corr (1982), File No. 166-2-12054 (Edwards).

DECISION: 84-32

Nova Scotia Forest Industries AND Canadian Paper Workers Union, Local 972.

Judge J. A. MacLellan, Arbitrator

Dennis Grant, for the union
Eric Durnford and Sara Filbee, for the employer
March 13, 1984

ISSUES: Organization and Direction of the Workplace - Assignment of Bargaining Unit Work to Non-unit Employees 5:1400; Organization and Direction of the Workplace - Persons Normally Performing the Work 5:3222; Collective Agreement - Ancillary Documents 4:1200; Recall 6:2354.

CIRCUMSTANCES: The grievor alleged that work done by him as Minerman during normal plant operation was performed by a Machine Tender for the maintenance crew during a shut-down of paper-making process. The grievor did not work during this period. In support of the allegation that the Minerman should have been called in to do this work, the Union pointed to a letter written by the Employer following a similar situation some years before in which the Employer acknowledged that the work was that of a Minerman and had compensated him accordingly.

AWARD: The grievance succeeds. The previously written letter indicated the intention of the Employer to be bound by that settlement in future lay-offs.

DECISION: 84-33

The Governors of Dalhousie College and University AND The Dalhousie Staff Association.

Judge J. A. MacLellan, Arbitrator

Gerald McConnell, for the union
Eric Durnford, for the employer
March 13, 1984

ISSUES: Rights of Recall 6:2354; Proof of Ability 6:3200; Unsuitability 7:3530.

CIRCUMSTANCES: The grievor was on lay-off and not re-hired when a position which she previously had held came open. The employer did not question her technical competence, but was reluctant to re-hire her because of her past record of unreliable and irresponsible behavior. The grievor explained that the problems which caused that behavior had been medically treated, and both she and her physician felt there would not be a recurrence. Past job evaluations and letters of reference were submitted, showing her supervisors considered her technical work to be good, and that if her psychological and emotional problems were solved, she would likely be a good employee.

AWARD: The grievor was found to be a convincing and sincere witness, indicating she had overcome her problems and would be able to function well within the position. The employer was unable to support the argument that her previous behavior would recur, and it was unreasonable to ask for any such guarantee. The grievor is to be re-hired and compensated for lost wages.

DECISION: 84-33, Supplementary

Governors of Dalhousie College and University AND the Dalhousie Staff Association

Judge J. A. MacLellan

John C. MacPherson, for the union
Eric Durnford and Sara Filbee, for the employer
June 18, 1984

ISSUES: Compensation: Entitlement to Wages 8:1000; Jurisdiction of the Arbitrator: The Collective Agreement 2:1200; Distribution of Work Within the Bargaining Unit: Compliance with the Wage Structure 5:2400.

CIRCUMSTANCES: In an award dated March 13, 1984, the arbitrator had ordered the grievor reinstated with reimbursement for lost wages and benefits because the employer had not given priority consideration for rehiring after the lay-off of the grievor within the meaning of the Collective Agreement. He retained jurisdiction if the parties could not agree on the remuneration to be paid to the grievor, who was reinstated in a lower classification.

The grievor argued that the arbitrator should exercise his discretion and award the higher rate of pay that she had been earning at the time of her lay-off since the Collective Agreement was silent about a re-hiring in a factual situation such as this.

AWARD: The arbitrator found that the University was correct in paying the grievor the salary for the classification at which she was reinstated and not the higher pay. Having reviewed the authorities, the arbitrator concluded that he would be exceeding his authority if he read into the Collective Agreement a provision that was not there.

AUTHORITIES: Governors of Acadia University vs. International Union of Operating Engineers, Local 968B, S. H. 45353 (unreported), May 28, 1984 (Rogers, J.)

DECISION: 84-34

Halifax Industries Ltd. AND Industrial Union of Marine and Ship-building Workers, Local 13.

W. C. Kennettle, Arbitrator

March 12, 1984

ISSUES: The Object of Construction: The Intention of the Parties 4:2100; Credited Service for Vacation 8:3220; Computation of Vacation Pay 8:3230.

CIRCUMSTANCES: The dispute is one of interpretation as to how vacation benefits accumulate. Vacation credits accrue for each week in excess of 13 weeks in any "year" while an employee is drawing compensation benefits. The union claimed benefits should be computed according to compensation year, beginning when the employee gets hurt and ending when he returns to work. The company interpreted "year" as calendar year.

AWARD: Vacation benefits are to be computed according to each week in excess of 13 weeks while the employee is drawing compensation within each calendar year.

DECISION: 84-35

Volvo Canada Ltd. AND International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, Local 720.

Judge J. A. MacLellan, Arbitrator

Larry Sheffe, for the union
John Merrick, for the employer
March 13, 1984

ISSUES: Notification of Absence 7:3110; Lateness 7:3140.

CIRCUMSTANCES: The grievor was discharged for frequent absenteeism over a 4 year period. He had received warnings as his rate of absenteeism was significantly higher than that of other workers. The absence was often unexplained and unjustified, and resulted in a disruption of the production line.

AWARD: The grievance fails. The grievor was unable to show his absenteeism would improve. Work within the plant depended on the proper number of men on the line and continued unwarranted absence justifies dismissal.

AUTHORITIES: Niagara Structural Steel (St. Catharines) Ltd. and UAW, Local 7012, (1978) 18 L.A.C. (2d) 385.

DECISION: 84-36

Chappells Building Supplies Ltd. AND C.B.R.T. & G.W., Local 230.

Judge J. R. Ferguson, Arbitrator

Thomas Barron, for the union
Bernard Boudreau, for the employer
March 10, 1984

ISSUES: Policy Grievance 2:3124; Entitlement to a Job 8:3340; Rights of Recall 6:2354, 7:3610.

CIRCUMSTANCES: While the grievor was on maternity leave, another employee performed her job. Upon the grievor's return, she was told the position would be terminated within a month and that the other employee would remain for that time. About 6 weeks later the grievor discovered that not only was the position still in existence, but a temporary position was created to deal with a backlog of work. The person doing the grievor's original job became ill, and the temporary employee took over the work. The employer said the grievor was eventually offered her previous position but she turned it down, so the grievance should fail on that point. It was also argued that the job in question was not the same job the grievor had held. The union said the job involved similar work, and regardless it included bargaining unit work for which the grievor's seniority rights applied. The grievor did not agree that the position had been offered to her.

AWARD: The grievor's seniority rights were in effect and she had a rightful claim to the position. Because she had been offered the position and refused it, she forfeited those seniority rights from that date forward. However, the company did delay resolving the grievance so the grievor is to be compensated for lost wages and benefits prior to the last job offer. The grievance succeeds on that count.

AUTHORITIES: Technical Associates Lodge 1972, International Association of Machinists and Roe Canada Ltd. 1954, L.A.C. 1759; United Electrical Radio & Machine Workers of America, Local 507 and Can. General Electric Co. Ltd. 1900, L.A.C. 537.

DECISION: 84-37

The Town of Kentville AND The Kentville Police Association.

S. Bruce Outhouse, Chairman; Charles A. MacDougall; Matthew J. McPherson

Bruce Evans, for the union
Peter Muttart, Q.C., for the employer
March 19, 1984

ISSUE: Overtime Work 8:2130.

CIRCUMSTANCES: Police officers are paid overtime for off-duty attendance at court or when "called to duty". The union considered attendance at a public inquiry initiated by the employer and held by the Police Commission of Nova Scotia to be a "call to duty" as officers were subpoenaed. The Chief of Police approved their claims for overtime but this was rejected by the employer because attendance at the inquiry was not considered a "call to duty". Only the employer can "call to duty", and the Commission was a third party with no standing to "call to duty" any officers.

AWARD: The grievance fails. "Called to duty" refers to the act of law enforcement. Off-duty attendance at the inquiry did not constitute "hours worked" as specified in the overtime clause, and cannot be considered part of the officers' regular duty. It was not the employer who requested the officers' attendance, but a third party, the inquiry itself.

DISSENT: MacDougall disagreed. The inquiry was in effect a court and the subpoenas were a "call to duty". The employees gave testimony as police officers, not as members of the public. The Police Commission was acting on behalf of the employer, which makes the employer responsible for costs.

DECISION: 84-38

Dominion Stores Limited AND United Food & Commercial Workers Union, Local 1973.

Milton J. Veniot, Arbitrator

Ron Pink, for the union
Peter LeBlanc, for the employer
April, 1984

ISSUES: Burden of Proof 7:2500; Discipline & Discharge: Alcoholic Beverages 7:3560.

CIRCUMSTANCES: The grievor, a night shift grocery clerk, was positively identified by security guards watching outside the store as the person seen leaving with a bag containing two bottles of rum, one empty, the other

half-empty. The grievor was allegedly seen depositing the bag in a grocery cart outside and then returning to work inside the store. The grievor denied leaving the store and any knowledge of the incident. The employer concluded on the strength of the eyewitness reports of the security guards that the grievor was lying and discharged him for dishonesty.

AWARD: The grievance succeeds. There were too many contradictions between the testimony of the security guards and other grocery clerks on duty that night for the arbitrator to conclude on a balance of probabilities that the grievor was the individual seen with the rum bottles. Since the employer had not proved beyond a balance of probabilities that the grievor had lied, any discipline was unwarranted.

AUTHORITIES: Re: City of Dartmouth (1980) 27 LAC (2d) 97; Brown & Beatty, Canadian Labour Arbitration, 2nd ed, p. 349.

DECISION: 84-39

Zot Transportation Limited AND Teamsters, Chauffeurs, Warehousemen, Helpers & Miscellaneous Workers, Local 927.

S. Bruce Outhouse, Arbitrator

Ron Pink, for the union
Glen Dexter, for the employer
April 4, 1984

ISSUES: Estoppel 2:2200, 2:2220; Statutes Applied by Board 2:2210; Collective Agreement - Ancillary Documents 4:1200; Collective Agreement - Amendments 4:1300; Collective Agreement - Term of Operation 4:1620; Collective Agreement - Memorandum of Agreement 4:1100.

CIRCUMSTANCES: Before merging with another company, Moffatt's, the employer sought the agreement of the union to terminate the present collective agreement and adopt the Moffatt collective agreement. Oral agreement was reached in regard to the Zot drivers and a written letter of understanding was signed in regard to the Zot Clericals. The employer then implemented its merger proposal with Moffatt and ceased to apply the Zot Collective Agreement and applied the Moffatt agreement instead. The union wrote to Zot two weeks later indicating that it still considered the Zot agreement in force until the membership had voted on the oral agreement. A week later the membership voted against terminating the Zot agreement.

The employer argued that an agreement to terminate the Zot agreement had been concluded; furthermore, if in fact no agreement had been reached, the Union was estopped from relying on the old agreement by its conduct. On the other hand, the union argued that the agreement was tentative and subject to ratification by the members. In addition, the drivers agreement was unsigned and thus invalid by s.1(1)(e) of the Trade Union Act. As for estoppel, the employer had not acted to its detriment, and even if it had, the letter two weeks later put it on notice that the union felt itself no longer bound by the oral agreement.

AWARD: The grievance succeeds in part. Since s.1(1)(e) of the Trade Union Act requires a collective agreement to be in writing, it follows that amendments thereto must also be in writing. Thus, the oral agreement bringing the drivers under the Moffatt agreement is invalid as an amendment and not binding; however, the clericals are bound since the letter of understanding was signed. Estoppel is inapplicable since the employer failed to show any detrimental reliance, and even if it did arise, the union letter terminated its operation.

AUTHORITIES: Trade Union Act, s.1(1)(e); Re: Canada Bread Co. Ltd. (1970) 22 LAC 98; Re: Massey-Ferguson Industries Ltd. (1979) 22 LAC (2d) 104; S.F. Bowser Co. Ltd. (1951) 2 LAC 751; Re: C.F.T.O. TV Ltd. (1983) 10 LAC (3d) 232; Hawker-Siddeley Canada Inc. Trenton Works Division v. United Steelworkers of America, Local 1231 (1983) 59 NSR (2d).

DECISION: 84-40

Maritime Telegraph & Telephone Company Limited AND International Brotherhood of Electrical Workers, Local 1030

W. Brent Cotter, Arbitrator

Ronald Pink, for the union
Greg North, for the employer
March 15, 1984

ISSUES: Discipline & Discharge - Disability 7:3200; Discipline & Discharge - Work Performance - Culpable Incompetence 7:3510; Discipline & Discharge - Procedural Limitations 7:2100; Disciplinary Penalties - Mitigating Factors - Onus 7:4400, 7:3250; Disciplinary Penalties - Mitigating Factors - Rehabilitative Potential 7:4422; Discipline & Discharge - Employer Response Other than Termination 7:3240.

CIRCUMSTANCES: The grievor, a telephone serviceman, grieved his non-culpable termination. The employer said the grievor's job performance was very substandard. The union argued, inter alia, that the company failed to consider the grievor's rehabilitative potential and also failed to take reasonable steps to provide alternate employment. Post-termination the grievor was diagnosed as mentally ill.

AWARD: The grievance is allowed in part. Inability to perform a job at a satisfactory level is a non-culpable basis for employer action. To terminate, the employer has the onus to establish the following: (1) the nature of the work and the standard expected; (2) that the employee was aware of the standard; (3) that the employee's work was below the standard; (4) that the employer provided supervisory assistance; (5) that the employer took reasonable steps to investigate and possibly offer alternate work; (6) the employer told the employee the consequences of substandard work; (7) the employer provided an opportunity to challenge the assessment by grievance;

and, (8) the employer made an assessment of whether there is a reasonable likelihood that the employee can in the foreseeable future obtain a satisfactory performance level. In regard to (8), the onus is on the employer to prove present inability to perform but the onus shifts to the union to prove that the inability will improve in the future. In addition, post-termination psychiatric diagnosis is admissible to indicate the prospects of rehabilitation.

In this case, the employer failed to establish (7) above. As a result, the grievor is placed on qualified layoff rather than terminated.

AUTHORITIES: Re: Massey-Ferguson (1969) 20 LAC 370; Re: Sieberling Rubber Co. (1969) 20 LAC 275; Grievance Arbitration: A review of current problems (Hickling ed., 1977); Re: Bell Canada (1983) 10 LAC (3d) 285; Re: Queen & Right of Ontario and Grievance Settlement Board (1980) 101 DLR (3d) 599; Re: Weston Bakeries Ltd. (1974) 5 LAC (2d) 38; Re: National Harbours Board (unreported, Oct. 1982); Re: Treasury Board of Newfoundland (1982) 3 L.A.C. (3d) 329; Re: Bayne: Maritime Telegraph & Telephone Company Ltd. (unreported, July 15, 1980, Lorne Clarke); Re: Atomic Energy of Canada Ltd. (1982) 5 LAC (3d) 248; Palmer, Collective Agreement Arbitration in Canada (2nd ed, 1983, p. 414); Re: Cannon (1973) 2 LAC (2d) 273; Re: Libby, McNeil, & Libby of Canada Ltd. (1972) 23 LAC 287; Re: Finning Tractor & Equipment Co. Ltd. (1982) 4 LAC (3d) 307; Re: Canada Packers Ltd. (1966) 16 LAC 407; Re: Howard R. Stark Ltd. (1973) 1 LAC (2d) 405; Re: John Bertram & Sons Ltd. (1950) 2 LAC 474; Re: Ajax Hydro Elec. Power Comm'n. (1963) 13 LAC 396; Re: Domter Packaging Ltd. (1976) 12 LAC (2d) 378; Re: Winship & Canada Freightways Ltd. (1983) 8 LAC (3d) 106; Re: Dehavilland Aircraft of Can. Ltd. (1964) 15 LAC 284; Re: Penticton (1977) 18 LAC (2d) 107.

DECISION: 84-41

Civil Service Commission AND Nova Scotia Government Employees Association

F.B.W. Kelly, Arbitrator

Ron Pink, for the union

Reinhold Endres, for the employer

April 12, 1984

ISSUES: Job Posting 5:2520; Bona Fides 5:2300; Skill & Ability - Arbitral Review 6:3100; Skill & Ability - Arbitral Review - Senior Employee If Relatively Equal 6:3220; Skill & Ability - Criteria of Ability and Qualifications 6:3300; Skill & Ability - Criteria of Ability and Qualifications - Requirements of the Job 6:3100.

CIRCUMSTANCES: A job posting for secretary to the Crown Prosecutor in Antigonish was issued. It stated that, inter alia, short-hand was required. The grievors and M. applied for the position. Five weeks later, another job posting was issued but this time the short-hand requirement was dropped. Each of the applicants was interviewed by a board of three, one of whom was the Crown Prosecutor for whom M. had worked for previously. The

candidates were scored on 11 different categories. References were required and submitted. M. was the unanimous choice, even though she was not a member of the bargaining unit. The union argued that the employer should not have proceeded to the second job posting (M. had poorer dictation skills); and if it was right to proceed, then the interviewing criteria were unreasonable and the grievor's applications & qualifications were not reasonably considered. The collective agreement required preference be given to seniority when two or more applicants are qualified and are of equal merit.

AWARD: The grievance succeeds. The second job posting was proper because the inclusion of the short-hand requirement in the first posting was a reasonable mistake by the employer. There was no effort to favour M.

As a general rule, unless there is evidence of discrimination, bad faith, or unreasonably exercised judgement, the arbitrator will not interfere with the employer's decision. In this case, the grievors were all qualified for the job. To determine if they were of equal merit to M., the employer's interview process must be scrutinized to see whether its standard on which it based its determination was deficient, unfair, or unrelated to the job functions required to be performed. There were several shortcomings: the Crown Prosecutor who had known and worked with M should not have been on the board, the check list placed undue emphasis on past legal experience, and the board did not follow through on the grievor's references. The selection board must perform its task fairly and honestly. A new interview process should be held.

AUTHORITIES: N.S.G.E.A. (Donahoe) & C.S.C. (1981, Outhouse); N.S.G.E.U. (Keefe) & C.S.C. (1981, Outhouse); N.S.G.E.A. (Sutherland) & C.S.C. (1981, Outhouse); N.S.G.E.A. (Clayton) & C.S.C. (1981, Langille); N.S.G.E.A. (Balcom) & C.S.C. (1981, Clarke, Durnford & Yates); N.S.G.E.U. (MacLellan) & C.S.C. (1982, Merrick); Galco Food Products Ltd. (1971) 22 LAC 248; Saskatoon Gallery v. CUPE (1983) 26 Sask.R. 112; Evans v. P.S.C. Appeal Board (1983) 1 Admin. L.R. 16.

DECISION: 84-42

Omega Construction Ltd. AND United Brotherhood of Carpenters & Joiners of America, Local 83

Eric G. DeMont, Q.C., Arbitrator

Ronald Pink, for the union
Gordon Wernica, for the employer
April 13, 1984

ISSUES: Union Security Claims 2:1426; Statutes 2:2100; Policy Grievance 2:3124; Damages, Back Pay and Mitigation 3:2412; Improper Work Assignments 2:1424; Union Security 9:1200.

CIRCUMSTANCES: The employer used non-union labour on his construction project and the union alleged this was in violation of the collective agreement between itself and the Construction Association Management Labour Bureau Ltd. The union wanted damages for loss of wages to its members. The employer denied liability as he was not a member of the Bureau and therefore is not bound by the agreement.

AWARD: The Trade Union Act provides for the continuation of union rights under the original collective agreement even when an employer ceases to be a member of the Bureau. The union had the right to supply the labour. Damages are not awarded as there was no proof that union members were unemployed and available for work during the time in question.

AUTHORITIES: Palmer, Collective Agreement Arbitration in Canada (2d), p. 724; Blouin Drywall 57 DLR (3d) 199; MacDougall Construction (Dec. 6, 1982); Iron Ore Co. of Canada 13 LAC (2d) 131.

DECISION: 84-43

City of Halifax AND The Halifax Civic Workers Union, Local 108.

Innis Christie, Chairman; Joe Ross; Eric Durnford

Bruce Evans, for the union
Gerry Goneau, for the employer
April 3, 1984

ISSUES: Illegal Strikes 2:1427; Damages, Back Pay and Mitigation 3:2412; Splitting the Hearing Between Merits and Remedy 3:2620.

CIRCUMSTANCES: This is a supplement to a previous decision (82-58) to determine the amount of damages to be paid by the union to the employer. The parties were unable to agree on the portion of costs resulting from the union's liability in a slowdown by the garbage collectors. The employer claimed the union should pay the whole amount. The union denied support of the slowdown and claimed the employer made no attempt to reduce its costs either through earlier contracting out or by changing the hours of operation of the transfer station. The employer should be held responsible for some of the costs because of re-organization of routes which resulted in some slow down while the workers adjusted.

AWARD: The union's claims that the employer failed to mitigate its costs are rejected. The employer was restricted by the collective agreement against contracting-out, and as the transfer station was used by other parties it was not possible to alter the hours it was open. The re-organization of the routes did contribute to the backlog in garbage collection. Because the union failed to intervene quickly in the slowdown it is liable for some of the costs. Damages are assessed at \$15,000.00 of the total \$93,986.49.

DECISION: 84-44

Sivaco Maritimes, a Division of Ivaco, Inc. AND United Steelworkers of America, Local 8679.

S. Bruce Outhouse, Arbitrator

Winston Ruck, for the union
David Bright, for the employer
April 16, 1984

ISSUES: Notification of Absence 7:3110; Inability to Discharge Employment Obligations 7:3220; Disciplinary Demotion 7:3544; Warnings 7:4416.

CIRCUMSTANCES: The grievor was demoted because of excessive absenteeism. He was a mechanic whose responsibilities included attending the machinery on the production line. The employer felt his attendance record was erratic and therefore might lead to a loss of production if machinery broke down during his absence. The union said the demotion was disciplinary and not justified. Most of the grievor's absences were directly related to illness or approved by the employer. No warnings had been given regarding the employer's intention to demote the grievor.

AWARD: The grievance succeeds. The grievor's absentee record was neither excessive nor indicative of sick leave abuse. An improvement in his attendance should be sought, but it was not bad enough to warrant the demotion which can only be viewed as a disciplinary action. The employer should have warned him of the consequences of excessive absenteeism.

AUTHORITIES: United Automobile Workers, Local 397 and Barber Ellis of Canada Ltd. (1968), 19 L.A.C. 163 (Schiff); United Automobile Workers and Massey-Ferguson Ltd. (1969), 20 L.A.C. 371 (Weiler); Atlas Steel Co. and Canadian Steelworkers Union, Atlas Division (1975), 8 L.A.C. (2d) 350 (Weatherhill); Allied Chemical Canada Ltd. and United Automobile Workers, Local 89 (1975), 9 L.A.C. (2d) 300 (Brandt); Metropolitan Authority of Halifax, Dartmouth and Halifax County and Correction Officers Association of Nova Scotia (1983), 10 L.A.C. (3d) 265.

DECISION: 84-45

Northside-Victoria District School Board AND Canadian Union of Public Employees, Local 981

Frank L. Elman, Q.C., Arbitrator

Gerald Yetman, for the union
David Ryan, for the employer
April 19, 1984

ISSUES: Past Practice 3:4430; Work Hours and Shifts 5:3100.

CIRCUMSTANCES: The employer has two categories of drivers: "five-hour" men who only drive students to and from school; and "mechanical/drivers" who work an 8 hour day both transporting children and working in the garage. The Board had received a special fund to transport a handicapped child to and from his home at lunch time, and the grievor, a "five-hour" man, performed this duty in addition to his regular runs. The fund expired and the special run stopped, with the grievor losing the additional work. The Board reinstated the run although it had not received new funds, and decided to use a mechanic/driver to transport the child. The grievor argued he should have been assigned the run as it was his previously. The Board's position was that the run was reinstated for humanitarian reasons. It received no additional funding and therefore used an employee already working an 8 hour day so as not to incur further costs.

AWARD: The grievance fails. The Board was under no obligation to transport the child at lunch time; if the run cost additional money it would have to be abandoned. The only way it could be continued was to use an 8 hour man, and the principle of past practice was not violated in these circumstances.

AUTHORITIES: Electric Auto-Lite, 7 L.A.C. 331.

DECISION: 84-46

Atomic Energy of Canada Limited AND Energy and Chemical Workers Union,
Local 832

Peter E. Darby, Chairman; George Morrison, Donald H. MacDougall

John F. Kane, for the Union
Eric Durnford, for the employer
April 4, 1984

ISSUES: Distribution of Work Within the Bargaining Unit: The Requirement of Bona Fides 5:2300; Job Posting 5:2529; Distribution of Work Within the Bargaining Unit; Express Prohibitions in the Agreement 5:2200.

CIRCUMSTANCES: As a result of a review of its personnel requirements, the company decided it was overstaffed in the in the stores classification of its operation. After reviewing the options, management decided to exercise its management rights as provided for in the Collective Agreement and transfer the extra employees to the Labourer classification. Provisions for increasing and decreasing the workforce as specified in the Agreement were followed.

The union argued that new jobs were created in the Labourer classification and thus had to be posted as stated in the Agreement regarding the filling of a "regular job opening". Otherwise, the company could, by a procedure of transferring employees from one job classification to another and not labelling the new jobs as "regular job openings" avoid its obligations to post jobs and deprive other employees of the opportunity to apply for a transfer.

The company countered by pointing to the provisions of the agreement regarding increasing and decreasing the workforce which enables an employee to refuse the transfer and elect to be laid off and placed on the recall list. If such transfers were posted the affected employees would have no option because the position would go to any employee with more seniority who applied for the posting. No new jobs were created because the total number of employees in the bargaining unit remained the same.

AWARD: The grievance fails. Although the Board had sympathy for the union's argument that the addition of new people to the Labourer classification created new jobs in that classification, the Agreement clearly authorized the company to lay off or transfer employees. Any other interpretation would lead to a conflict within the Agreement between articles regarding the options of a transferred employee and regarding posting of jobs. The decision was reinforced by the fact that no personal grievances were filed and the unlikelihood that an employee in another classification would want such a transfer given the fact that it was the one classification in which no job promotions existed.

DECISION: 84-47

Lowney Inc.: Moirs Plant AND Bakery, Confectionery & Tobacco Workers
International Union, Local 446

Judge J. A. MacLellan

Rene Quigley, for the union
John Plowman, for the company
May 4, 1984

ISSUES: Grounds for Discipline: Fighting, Assault 7:3430; Disciplinary Penalties: Employment Record 7:4428; Primary Sources of Jurisdiction: Reinstatement and Substitution of Penalty 2:1470.

CIRCUMSTANCES: The grievor was suspended for five days following an incident in which he grabbed a supervisor and verbally abused him.

The company followed the procedure as outlined in the Agreement in disciplining the grievor and based the penalty on that given to two other employees following similar incidents.

The union argued for a reduction in the penalty, pointing to the grievor's unblemished record of 29 years with the company. The other incidents were distinguished since the employees involved were short term employees.

AWARD: The grievance succeeds. The maximum penalty imposed under the Collective Agreement was too severe, considering the contriteness of the employee and the years of service. Suspension was reduced to two days and the grievor was entitled to compensation for three days of lost wages.

DECISION: 84-48

City of Dartmouth AND Nova Scotia Union of Public Employees, Unit #1

S. Bruce Outhouse, Chairman; David P. Reynolds; Eric B. Durnford

Howard Epstein, for the union
Michael Morash, for the employer
April 9, 1984

ISSUES: Distribution of Work Within the Bargaining Unit: Revision of Classification and Rates 5:2440; Express Prohibitions in the Agreement 5:2200; Admissibility of Evidence: Extrinsic Evidence 3:4400; Arbitration of Grievances in Context: The Nature of Arbitral Process 1:2000.

CIRCUMSTANCES: At issue was the classification under the Collective Agreement of the janitors employed by the city. The classification of "janitor" was not included in the Agreement.

At an earlier arbitration, the Board had ordered that the janitors be classified under one of the existing classifications and paid accordingly. The employer placed them under "incinerator operator", a now defunct classification, which, although included in the Agreement had no pay scale specified. After examining whether the Board was functus officio or not, the Board decided it had jurisdiction to clarify the intent of the award and as requested by the union, amended the original award to order that the janitors be classified under one of the existing classifications and rates of pay of the Agreement.

The question of whether the Board could rule on the specific issue of classifying the janitors as incinerator operators was taken to the Supreme Court who ordered the Board to make such a ruling.

In this subsequent arbitration the union gave evidence regarding the history of the classification of incinerator operator within the content of the Agreement. The employer objected to the introduction of new evidence since the issue was one of interpretation only and the parties had had opportunity to present all relevant evidence at the original hearing.

The union argued that the janitors could not be classified as incinerator operators because the Agreement in Article 1.02 stated that all employees should be classified under one of the classifications and rates of pay specified by the Agreement. This article was being violated because the classification of incinerator operator had no rate of pay.

Secondly, the union argued that the employer was estopped from classifying the janitors as anything other than labourers because it had originally, for a period of a month, paid them as labourers.

Alternatively, if the Board were to find that the janitors could be classified based on the extrinsic evidence of the last scale included in the Agreement and subsequent increases. Dashes or blanks should not entitle the employer to pay whatever it wished.

The employer argued that Article 1.02 applied to all classifications including incinerator operators and the absence of a pay scale for incinerator operators should not prevent the use of the classification. The rate of pay could be supplied by the employer acting unilaterally pursuant to its management prerogative.

The employer denied bad faith in its classifying the janitors. The order to classify the janitors under an Agreement having no janitorial classification was an artificial one and it responded by making an artificial classification, not feeling compelled to put the janitors in the classification most closely resembling their work.

AWARD: The employer's evidentiary objection was not accepted. The evidence provided the Board with the factual background to the issue being interpreted.

The employer's classification was disallowed. Under Article 1.02, the classification of an employee must include a rate of pay.

Having reached a decision on the interpretation of the Agreement the Board did not rule on the arguments of estoppel and bad faith although it indicated that it would not have found acceptable the union estoppel argument or the employer's "artificial situation" reasoning.

DISSENT: Mr. Durnford felt that the Board had overstepped its jurisdiction in handing down the award. An arbitration board can make its decision based only on the Agreement as it exists. Mr. Durnford pointed out that other classifications, such as garbage collector, were not currently in use although they were included in the Agreement. If the employer again recommenced its garbage disposal collection, the union would reactivate the positions and renegotiate the salary and also the position of incinerator operator.

The entire issue arose because the employer was forced to classify employees under the Agreement when no appropriate classification existed. Only a renegotiation of the contract would remedy such an artificial situation. Therefore, Mr. Durnford would allow the Employer's actions.

AUTHORITIES: Nova Scotia Nurses' Union (Halifax Infirmary Local vs. Halifax Infirmary Hospital (1982), 54 N.S.R. (2d) 289. Hawker Siddeley Canada Inc., Trenton Works Division v. United Steelworkers of America, Local 1231 (1983), 59 N.S.R. (2d) 29.

DECISION: 84-49

Southern Electric Limited AND International Brotherhood of Electric Workers, Local 625

R. Lorne MacDougall

Ronald A. Pink, for the union
Patrick L. Casey, for the employer
May 10, 1984

ISSUES: Jurisdiction of the Arbitrator: The Statutory Requirement 2:1100; Primary Sources of Jurisdiction: Union Security Claims 2:1426; Assignment of Work Outside the Bargaining Unit: Remedies for Improper Work Assignments 5:1500; Union Rights: Union Security 9:1200.

CIRCUMSTANCES: The issue was whether the employer violated the union Security Clause of the Collective Agreement by hiring non-union employees.

The employer raised the preliminary objection that the issue was not arbitrable and the arbitrator was without jurisdiction because the parties did not have a valid legal agreement to which the provisions of the Trade Union Act applied.

The employer had since 1971 hired some workers through the union office and had paid union dues for some workers since 1978. When violations of union rules had been pointed out, the employer had remedied it. However, the employer was not a member of the Construction Association Labour Management Bureau and had not knowingly filed a voluntary document of recognition.

In 1971, the employer had signed a document presented to it by the union representative with the understanding that it was valid only one year. This document was not filed with the Department of Labour until 1980.

Since January, 1984 the employer had had four non-union employees on its payroll, two whose union dues had lapsed and two who had never been part of the union.

AWARD: The arbitrator made an extensive review of the authorities in determining that he had jurisdiction to review the grievance. He found that the document signed by the employer in 1971 became valid upon filing in 1980, despite the time that had elapsed and the ignorance of the employer as to its import. Given this, the Collective Agreement applied to the company's employees and the employer was in violation of the union security clause.

It was ordered that the two employees whose union membership had lapsed be replaced unless their unpaid dues had been paid. No damage award was made. The other employees were also ordered replaced and the employer was ordered to pay the union a sum of money which represented the Collective Agreement rate for total hours worked by the employees plus 7% vacation pay, 2% in lieu of paid holidays, 25 cents per hour for the Health and Welfare fund and 95 cents per hour for the Pension Plan contribution from the date that the violation was brought to the employer's attention to the date of the termination of the employees.

AUTHORITIES: Re Carpenters' District Council of Toronto and Vicinity and Engineering Structures and Components 85 D.L.R. (3d) 443. Palmer: Collective Agreement Arbitration in Canada (2d), pp. 98-9. MacDougall Construction Limited and United Brotherhood of Carpenters and Joiners of America, Local 1392 (unreported), December 6, 1982 (F.B.W. Kelly). Re MacKenna Brothers Ltd. and Plumbers Union, Local 527, (1975) 10 L.A.C. (2d) 273 (O.B. Shime); Brown and Beatty, Canadian Labour Arbitration (2d).

DECISION: 84-50

Metropolitan Authority AND Correction Officers' Association of Nova Scotia

W. Brent Cotter

Raymond Larkin, for the union
March 22, 1984

ISSUES: The Statutory Requirement 2:1100; Pre-hearing Disclosure 3:1400;
Production of Documents 3:1420; Privilege 3:4340.

CIRCUMSTANCES: This concerns a preliminary issue only as the grievance was settled before the final hearing. The employer asked that a particular witness be directed to present certain documents relating to evidence they felt was prejudicial to their case. The union argued the witness had fulfilled the terms of the subpoena and as the subpoena was issued by the Supreme Court of Nova Scotia, it was not enforceable by the Board. The issue was whether the witness had fulfilled his obligations or had a further duty to meet the demands of the employer, and if so, did the Board have the power to enforce the terms of the subpoena.

AWARD: The witness had not satisfied the terms of the subpoena regarding disclosure of all relevant information and documents; however, the Board does not have the power to enforce a subpoena issued by the Supreme Court of Nova Scotia. Further, it was the board's view that the subpoena should have been served on the company which owned the documents rather than on any one individual.

AUTHORITIES: Wignore on Evidence (3d ed. 1935), vol. 3, p. 64- . Hammond (1898), 29 O.R. 211. Ex parte Fernandes 10 C.V.N.S. 3. Ontario Bean Producers' Marketing Board v. W. G. Thompson & Sons Ltd. (1982), 134 D.L.R. (3d) 108. Rubber Workers and Michelin Tires Ltd. (1979), 3 Can. L.R.B.R. 433. Penn-Texas Corporation v. Murat Anstalt et al. (No. 2) (164), 2 ALL E. R. 594. Penn-Texas Corporation v. Murat Anstalt et al. (No. 1) 1963), 1 ALL E.R. 258

DECISION: 84-51

Bolands AND Bakery, Confectionery and Tobacco Workers International Union,
Local 446.

S. Bruce Outhouse

Rene Quigley, for the union
Gregory North, for the employer
May 24, 1984

ISSUES: Temporary, Casual and Part-time Employees 5:1124; Proprietary Rights to Overtime assignments 5:3220; Remedies 5: 3240.

CIRCUMSTANCES: The union alledged the employer used casual employees to perform work full-time employees should be doing on overtime. The employer regularly brought in casuals one afternoon which the union said was an abuse of the Casual Help article in the Collective Agreement. The employer claimed casuals were used only during peak load situations as specified in the Agreement, and there were no prohibitions to doing so when the peak loads occurred on a regular basis.

AWARD: The grievance fails. The employer had used casuals according to the restrictions laid down in the agreement and was trying to manage the work force in the most efficient manner.

DECISION: 84-52

The Canadian Salt Co. Ltd. AND Energy and Chemical Workers Union, Local 823

S. Bruce Outhouse, Chairman; George Morrison, D. B. Eddy

John Kane, for the union
Robert MacDonald, Q.C., for the employer
May 15, 1984

ISSUES: Interpretation of Collective Agreements 4:2000; Assignment of Bargaining Unit Work to Non-employees: Contracting Out 5:1300; Rights of Recall 6:2354.

CIRCUMSTANCES: The union asked damages for wages lost when the company contracted out work while employees capable of doing the work were on lay-off. The company denied compensation was due as the men were already on lay-off when the contracting out occurred and the collective agreement specified only that employees shall not be laid off as a result of contracting out. The union contended the contracting out was a continuation of a lay-off and the men should have been recalled.

AWARD: The lay-off was not a result of contracting out and therefore no causal relationship, as specified in the agreement, existed. The grievance fails.

AUTHORITIES: Rockwell International of Canada Ltd. and United Automobile Workers, Local 127 (1982), 6LAC (3d) 304 (Rayner)

DECISION; 84-53

Mersey Electrical and Contracting Ltd. AND International Brotherhood of Electrical Workers, Local 625

Eric G. DeMont, Q.C.

Ronald Pink, for the union
Gerald Freeman, for the employer
May 15, 1984

ISSUES: Union Security Claims 2:1426; Assignment of Work Outside the Bargaining Unit: Contracting Out 5:1300; Alteration of Wages 8:1400; Union Liabilities 9:2000.

CIRCUMSTANCES: The employer hired non-union electricians after a number of union employees transferred to another project paying higher wages. He then attempted to hire more union members but none were available, and inferred from discussing with union officials that he could hire local workers. A secondary aspect of the grievance was that all construction workers are governed by one Collective Agreement which specifies wages. The employer claimed that the higher wage paid by another company party to the Agreement, violated the Agreement. The union said the higher wage was offered and accepted with no negotiating involved so there had been no violation of the Agreement.

AWARD: The employer clearly violated the Collective Agreement by using non-union electricians. The higher wage offer did not constitute "negotiations" as prohibited by the Agreement, and the union members were under no obligation to remain with the employer under any circumstances. The grievance succeeds and damages for lost wages are awarded to the union.

AUTHORITIES: Fluid Power (1967), 19 LAC 51.

DECISION: 84-54

All Wall Construction Ltd. AND United Brotherhood of Carpenters & Joiners of America, Local 83.

S. Bruce Outhouse

Ronald Pink, for the union
(Employer not represented)
May 28, 1984

ISSUES: Abandonment, Settlement and Withdrawal 2:3230; Assignment of Bargaining Unit Work to Non-Union Employees: Contracting Out 5:1300.

CIRCUMSTANCES: The employer was not represented at the hearing as the company had gone out of business; only the union gave evidence. The employer had used non-union labour in contravention of the Collective Agreement and the union sought damages for lost wages and union dues.

AWARD: The employer did breach the Agreement and the union is awarded damages for lost wages. The employer was not required to contribute towards union dues therefore the union's request was disallowed as was the union's claim to the employer for previous indebtedness.

DECISION: 84-55

Lord Nelson Hotel AND Hotel & Restaurant Employees and Bartenders
International Union, Local 662

Judge G. Hughes Randall, Chairman; Greg North; Jeff Clare

April 18, 1984

ISSUES: Grounds for Discipline: :atness 7:3140; Grounds for Discipline:
Incompetence 7:3510; Grounds for Discipline: Insufficient and/or Careless
Work 7:3520; Insolent, Unco-operative Behaviour, Obscene Language 7:3660.

CIRCUMSTANCES: The grievor was dismissed from his position as a part-time
Kitchen attendant. His evaluation following his probationary period
indicated that he was co-operative but slow in his productivity. His
employment was continued but his supervisor found that his productivity did
not improve, that the grievor was often late for work, and that he often
arranged for shift changes. He was suspended for a week because of an
incident when he arranged for a shift change when permission was denied.

The chef allowed him to work during the suspension period because of the
grievor's plea of economic hardship. However, the suspension was noted on
the grievor's work record.

The chef, who was the grievor's supervisor and the person who hired him,
terminated employment following two incidents on the same day - the grievor
was late for work in the kitchen, although his time card was punched
earlier, and he was rude to the sous chef who sought him out when the
grievor was late returning from lunch.

The grievor's defense was to deny his tardiness based on what he claimed to
be his regular practice.

AWARD: The majority dismissed the grievance. The grievor was not found to
be a credible witness. It was felt that the employer had cause to dismiss
the grievor based on his past performance which had never been entirely
satisfactory.

DISSENT: Mr. Clare did not concur with the majority decision because he
felt the decision reached was too harsh, given the circumstances.

DECISION: 84-56

The Halifax Infirmary AND The Canadian Brotherhood of Railway, Transport &
General Workers Local 606.

James C. Leefe, Chairman; William J. McMullin; Donald H. McDougall

Raymond Larkin, for the union
Eric Durnford and Sara Filbee, for the employer
May 15, 1984

ISSUES: Disciplinary Penalties: The Doctrine of the Culminating Incident 7:4310; Grounds for Discipline: Refusal to Follow Instructions 7:3610; Disciplinary Penalties: Rehabilitative Potential 7:4422; Jurisdiction of the Arbitrator: Reinstatement and Substitution of Penalty 2:1470.

CIRCUMSTANCES: The grievor was dismissed as a hospital orderly following a culminating incident, based on the grievor's past performance. He failed to properly clean a patient's suction apparatus after being instructed to do so by the operating room nurses. In dismissing the grievor, the supervisor made reference to his past performance. Evidence at the arbitration hearing indicated that the grievor had been warned both verbally and in writing during the past four years that his work conduct was unsatisfactory. He was suspended twice - for one day and for five days. Work performance would improve for a short period of time, but eventually the same incidents of poor performance recurred - abuse of the telephone, complaints of his personal hygiene, work performance and being late reporting for duty.

The grievor had been employed by the hospital for fourteen years, although his formal disciplinary record was kept only for the last four years. He had a grade five education with infant children to support and little prospect of employment.

AWARD: The Board found the employer justified in disciplining the grievor based on the past performance and the culminating incident. There was no indication that the grievor's work performance would improve if reinstated. However, considering the circumstances and the length of employment, the Board ordered a money award in lieu of reinstatement.

AUTHORITIES: Brown and Beatty: Canadian Labour Arbitration (2d), pp. 475-479. Re Air Canada and Canadian Airline Employees Association (1981) 4 L.A.C. (3d) 68 (Shine). Lily Cups Ltd. and Printing Specialties Union (1981) 3 L.A.C. (3d) 6 (H.D. Brown, Chairman).

DECISION: 84-56 (Supp).

The Halifax Infirmary AND The Canadian Brotherhood of Railway, Transport & General Workers, Local 608

James C. Leefe, Chairman; William J. McMullin; Donald H. McDougall

Raymond Larkin, for the union
Eric Durnford, for the employer
July 31, 1984

ISSUES: Compensation: Severance Pay 8:3800; Jurisdiction of the Arbitrator: Damages 2:1410.

CIRCUMSTANCES: By a prior award, the Board awarded the grievor a money payment in lieu of reinstatement. Written submissions from the union and the employer argued the amount of such a payment.

The union submitted the grievor should receive compensation from the date of discharge to the date of the final award (approximately 14 months) for loss of economic fringe benefits, calculated at 15% of salary and pre-judgement interest at 12%. The employer submitted that additional compensation was unwarranted, pointing to the collective agreement which provided one month's pay as a retirement allowance, arguing that the grievor was not entitled to more.

AWARD: The Board exercised its discretion in balancing the grievor's 14 years of employment with his far-from-blameless work record. Taking everything into consideration, the grievor was awarded \$6,500.

DECISION: 84-57

The City of Sydney AND The Canadian Union of Public Employees, Local 933

David J. Macdonald, arbitrator

Gerald Yetman, for the union

M. G. Whalley, Q.C., for the employer
May, 1984

ISSUES: Distribution of Work Within the Bargaining Unit: Vacancies
5:2510. Distribution of Work Within the Bargaining Unit: Express
Prohibitions in the Agreement 5:2200.

CIRCUMSTANCES: The union contended that the employer violated the provisions of the Collective Agreement regarding promotions and staff changes when it failed to replace an employee who resigned. Her duties and responsibilities were taken on by the remaining employees. The employer's position was that the institution of a centralized system reduced the workload. Counsel maintained that the employer was under no obligation to replace the vacancy since it is management prerogative to determine whether a vacancy exists or not.

AWARD: The arbitrator examined the key authorities to determine whether or not a vacancy existed since the Collective Agreement was silent on the matter. He concluded that his only jurisdiction was to determine whether the employer made the decision regarding the vacancy based on the availability of work. It is not enough that the employer treat the situation on the basis of management prerogative. Because the City of Sydney admitted that the new centralized system was being given a trial, they had not yet made any decision regarding the availability of work. Therefore, the grievance succeeds.

AUTHORITIES: Re International Nichol Company of Canada and U.S.W., (1974) 6 L.A.C. (2d) 104. Re Horthon Steel Work Ltd. and United Steelworkers, Local 3598 (1973) 3. L.A.C. (2d) 55. Re Oil Chemical and Atomic Workers, Local 9-599 and Tidewater Oil Co. (Canada) Ltd. (1983) 14 L.A.C. 243. Re Toronto Electric Commissioners and C.U.P.E., Local 1, (1974) 6 L.A.C. (2d) 243. Re Air Canada and Canadian Airline Employees Association, (1975) 8 L.A.C. (2d) 239.

DECISION 84-58

MacIntyre Chevrolet Oldsmobile Ltd. AND Canadian Brotherhood of Railway,
Transport and General Workers, Local 506

Frank L. Elman, Q.C., arbitrator

Tom Barron, for the union
T.J.K. Gillis, for the employer
June 11, 1984

ISSUES: Assignment of Work Outside the Bargaining Unit: Unit Definition in
Terms of Employees 5:1120; Distribution of Work Within the Bargaining Unit:
Revision of Classification and Rates 5:2440.

CIRCUMSTANCES: Both grievors had been employed, for ten years and fifteen
years respectively, as number one stockmen with the employer (or its
predecessor). As a result of economic hardship, the employer offered the
grievors the opportunity to "bump" less senior employees and take a
demotion, or be fired. Both opted for a demotion, one becoming a number two
stockman and the other a trucker. The grievance was filed because it was
alleged that the manager and assistant manager took over the jobs of the
number one stockmen as a result of this, contrary to the Collective
Agreement, which prohibited management from performing bargaining unit work.

AWARD: The grievance succeeds in part. There was insufficient evidence for
the arbitrator to find that management employees were doing bargaining unit
work. However, the employee demoted to number two stockman was still doing
the work of a number one stockman and it was ordered that he be reimbursed
accordingly. The demotion to truck driver of the other employee was within
management's rights and was a demotion in duties, as well as salary, so his
grievance fails.

AUTHORITIES: Re Orendo Limited and International Association Machinist
Lodge 1922, 1 L.A.C. (2d) 72. Re United Steel Workers, Local 1817 and
Fittings L.T.D. Limited, 10 L.A.C. 294.

DECISION: 84-59

The Annapolis District School Board AND the Canadian Union of Public
Employees Local 1187.

Judge J. A. MacLellan, Chairman; Ian MacPherson; Bruce Gillis

Dan MacLean, for the union
John Cameron, for the employer
June 25, 1984

ISSUES: Interpretation of Collective Agreements: The Object of
Construction: Intention of the Parties 4:2100. Interpretation of
Collective Agreements: The Collective Bargaining Context 4:2300.

CIRCUMSTANCES: The grievor was a part-time bus driver who felt he should be given preference in filling the position of caretaker with the Board. He based his argument on the clause of the Collective Agreement binding the employer to provide as much work as economically feasible to the employees covered by the Agreement. The caretakers were in a different bargaining unit than the bus drivers and had a different Collective Agreement although both units were represented by the same union. The union argued that the clause in question cut across bargaining unit boundaries and applied to any positions with the employer, subject of course to any restrictions in another agreement. Evidence of past negotiating history regarding intent was given.

AWARD: The Board majority did not accept the union's arguments because the definition of terms of the agreement removed any ambiguity. By these definitions, the Agreement applied to bus drivers and mechanics only and the terms could not be extended to the positions of caretaker.

DISSENT: Mr. MacPherson felt that logic would dictate that the employer would wish to provide full employment wherever possible and the combination of bus driver and caretaker was within the realm of possibilities considered at the time of negotiating the clause in question, especially since other school boards had such combinations. He also pointed to another clause in both Agreements whereby the parties recognized "the principle of promotion within the service of the employer", thus giving weight to the argument that any jobs in the employer's service were open to employees.

DECISION: 84-60

MacIntyre Chevrolet Oldsmobile Ltd. AND Canadian Brotherhood of Railway,
Transport and General Workers, Local 506

R. Lorne MacDougall, Q.C., Arbitrator

Tom Barron, for the union
T.J.K. Gillis, for the employer
June 25, 1984

ISSUES: Bumping 6:2330; Senior Employee With the Required Ability 6:3210.

CIRCUMSTANCES: The collective agreement states that seniority be applied by department: mechanics, stockroom, auto bodyman. Lay-off proceeds according to departmental seniority and ability to perform the job. Mechanics work in one of two areas, the used car section or the main garage. These two areas run independently of each other with separate staff and management. An employee from the used car section was kept on even though he had less seniority than three mechanics who were laid off from the main garage. The employer argued first, that the two sections were separate and seniority in one department did not imply seniority in the other; second, the employees from the main garage were not trained or able to do the work in the used car

section. The union argued that the collective agreement put all mechanics in one seniority group regardless of where they work, and the employees on lay-off were both capable of doing the work and had experience performing the additional tasks required.

AWARD: The collective agreement makes no distinction between mechanics in either section of the company and therefore seniority is to be applied equitably among all mechanics. Only one mechanic from the main garage was proved to have the necessary experience and ability to handle the work in the used car department so the grievance succeeds in respect to him.

DECISION: 84-61

Corporation of the City of Toronto AND Canadian Union of Public Employees,
Local 79

Innis Christie, Chairman; Bradshaw J. W. Paulin, Murray Tate

Harold F. Caley, for the union
John P. Sanderson, Q.C., for the employer
March 23, 1984

ISSUES: Administrative Agencies 1:4100; The Adducing of Evidence 3:3000; Hearsay 3:4310; Weighing the Evidence 3:5100; Disciplinary Demotion 7:3544; Multiple Penalties 7:4240.

CIRCUMSTANCES: The grievance alleges demotion and discharge without reasonable cause. The employer based its actions on a report which investigated the grievor's work record, first demoting him and followed shortly thereafter by dismissal. This matter was dealt with previously by the arbitration board which decided the report was inadmissible as evidence, therefore the employer did not prove its case and the grievance succeeded. Subsequently, the issue on the report's inadmissibility was the subject of two court cases, the result being the board was directed to accept the report as evidence and reconvene the hearing.

The issue was whether the report supports the employer's claim of misconduct and justifies the dismissal of the grievor. There was no other evidence submitted by the employer so the board was required to weigh the probative value of the report against the grievor's testimony.

The report was examined thoroughly, point-by-point, and its conclusions were judged by its supporting evidence and documentation.

AWARD: The grievance succeeds. There was evidence in the report that the grievor used poor judgement in some aspects of his work, but the employer has not discharged its onus of proving significant misconduct which would justify any form of discipline.

DISSENT: Paulin felt the Board treated the report as a transcript of evidence and so applied unfair standards to the reasonableness of its conclusions. The report was not intended to outline evidence. The grievors testimony was often irrational and not credible, and should not have been considered more reliable than the information in the report.

AUTHORITIES: City of Toronto and C.U.P.E., Local 79 (1981), 125 D.L.R. (3d) 249. Corporation of the City of Toronto (1978), 19 L.A.C. (2d) 388. City of Toronto and C.U.P.E., (1979) unreported. Palmer, Collective Agreement Arbitration in Canada (2d ed.) 1983 at p. 284. Long Manufacturing Division, Borg-Warner Canada Ltd. (1976), 11 L.A.C. (2d) 395. Lever Detergents Ltd. (1979) 23 L.A.C. (2d) 145. Girvin et al. and Consumers' Gas Company (1973), 40 D.L.R. (3d) 509.

DECISION: 84-62

Canada Post Corporation AND Canadian Union of Postal Workers

D. W. Tingley, for the union
V. W. Pylypchuck, for the employer
June 28, 1984

ISSUES: Policy Grievances 2:3124; The Scope of the Arbitral Review 6:3100; Trial, Training and Familiarization Periods 6:3230; Examinations and Tests 6:3340.

CIRCUMSTANCES: The union submits that the employer's standard for speed and accuracy on the encoder machines which must be reached within 80 hours of training is unreasonable and limiting to seniority rights of transfer. It is not enough time to provide sufficient and adequate training and they want the training period extended to 6 months. The employer gave evidence that most employees attain the standard within 80 hours, and claimed the machines now used are easier to use than those in place when the 80 hour limit was imposed.

AWARD: The grievance fails. The encoder training itself is sufficient and adequate apart from considerations of time, and the employer's evidence supported the reasonableness of the 80 hour limit on training.

DECISION: 84-63

Town of Kentville AND Kentville Police Association, Local 107 of the Police Association of Nova Scotia

Innis Christie, Chairman; Charles A. MacDougall; Matthew J. MacPherson

Bruce W. Evans, for the union
Alan T. Tufts, for the employer
June 26, 1984

ISSUES: Waiver of Procedural Irregularities 2:3130; Interpretation of the Collective Agreement 4:2000; Statutes 4:2230.

CIRCUMSTANCES: There was a preliminary objection by the employer that the grievance procedure had not been complied with. Step 2 was passed over by the union, but the employer had not raised any objection until this hearing. The employee therefore waived its right to question the procedure by failing to make a timely objection.

Members of the union appeared before a Board of Inquiry where they were represented by legal counsel. The collective agreement states the employer will pay the cost of legal representation at proceedings from "public complaints". The employer did not feel obligated to pay the legal costs because the Board of Inquiry was not established because of public complaints but as a result of a direct request by the Kentville Board of Police Commissioners. The union's position is that the Board of Police Commissioners requested the inquiry because of complaints from within and outside the police force, and as the Board of Inquiry dealt with specific complaints about specific employees, the employer is liable for costs. The Police Act, under which authority the Board of Inquiry was convened, does not make reference to "public complaints". There is no qualification about where the complaints originate.

AWARD: The grievance succeeds. The Board of Inquiry investigated numerous complaints, "public" and other, against certain members of the police force. The employer is responsible for the costs of the employees' legal representation respecting such investigations.

DISSENT: MacPherson considered the Arbitration Board exceeded its Jurisdiction when applying the Board of Inquiry's mandate to investigate the management of the police force to the provisions for legal costs, meant for proceedings instituted in court or as a direct result of public complaints.

AUTHORITIES: Palmer, Collective Agreement Arbitration in Canada (2d ed.) 1983. p. 209-11. Martin v. Attorney General of Nova Scotia (1980), 39 N.S.R. (2d) 325.

DECISION 84-64

Crossley Karastan Carpet Mills Ltd. AND Canadian Brotherhood of Railway, Transport and General Workers, Local 612

D. Arthur Nichols, Q.C., Chairman; Judge J. A. MacLellan; Kenneth Hennick

George Boudreau, for the union
James C. Leefe, Q.C., for the employer

ISSUES: Past Practice 3:4430; Allocation of Overtime Within the Group 5:3224.

CIRCUMSTANCES: The Grievor lost an opportunity for overtime through an oversight by the employer, and wants compensation for the time. The employer claims it has three months to equalize the overtime and is prepared to offer the grievor the next overtime available. The collective agreement is silent on the specific allocation of overtime but does state it must be on an equal opportunity basis. Evidence of past practice indicated overtime was allocated on a day-to-day basis and when an employee missed an equal opportunity, the company paid for the missed overtime.

AWARD: The grievor had followed the proper procedure to register for overtime and the company was at fault for her missing it. She is to be given, immediately, a chance to work the lost overtime, in either her own classification or in her role as acting Foreman.

DISSENT: Hennick did not agree she could work the overtime as acting Foreman because the position was not part of the bargaining unit.

AUTHORITIES: Hawker Siddley Canada Inc. v. The United Steelworkers of America, Local 1231 (1980) (J. Matheson). The Nova Scotia Nurses Union v. Eastern Shore Memorial Hospital (1984) (J. Richards). Governors of Acadia University v. International Union of Operating Engineers, Local 968B (1983) (J. Rogers).

DECISION: 84-65

Hillcrest Manors Nursing Home Ltd. AND The Canadian Brotherhood of Railway, Transport & General Workers Union, Local 608-A

Judge J. A. MacLellan, Arbitrator

George Boudreau, for the union
David W. Gruchy, Q.C., for the employer
July 5, 1984

ISSUES: Compensation: Holiday Pay 8:3100; Organization and Direction of the Workplace: Temporary, Casual and Part-time Employees 5:1124.

CIRCUMSTANCES: The grievor, a part-time employee, wished to receive holiday pay for the recognized holidays she had worked over a one-year period. She was advised that the collective agreement did not cover part-time employees although the employer did pay the grievor for general holidays as provided for by the Labour Standards Code. However, the grievor wished payment for two other holidays. The collective agreement provided for holiday pay for regular employees and regular part-time employees, as defined. To obtain holiday pay, an employee had to work her last scheduled shift prior to each holiday or next scheduled shift following each holiday or had been on paid leave.

AWARD: The grievance fails. There was no evidence that the grievor fulfilled the requirements of the collective agreement for holiday pay, therefore it was not necessary to determine whether or not the grievor was covered by the collective agreement.

DECISION: 84-66

National Sea Products Limited AND The Canadian Seafood and Allied Workers Union, Local 101

R. Lorne MacDougall, Q.C., Chairman; Gerald Yetman, Eric B. Durnford

Ronald A. Pink, for the union
Donald H. McDougall, Q.C., for the employer
June 19, 1984

ISSUES: Discipline: Refusal to Follow Instructions 7:3610; Discipline: Reasonableness of the Penalty 7:4300.

CIRCUMSTANCES: The grievor felt that she had been unjustly disciplined and requested that the warning slip given her following the incident in question be withdrawn from her file.

The grievor worked the night shift processing fish. As part of the operation in which she was involved, a lead hand had the responsibility of working with the group of processors, organizing the work and showing the workers how to perform the task at hand. There was to be no involvement in discipline to fellow employees. On the night in question, the lead hand asked the supervisor to oversee the table at which the grievor was working. While doing this, the supervisor decided that the grievor and the two workers beside her were too noisy and to avoid disrupting the work flow, asked the grievor, who was in the middle, to move. The grievor refused although requested to move four times. She maintained that the lead hand had reported her and because he was not to be involved in discipline, she did not have to be disciplined. Her refusal to obey the supervisor's orders was the reason for the warning slip.

AWARD: The grievance fails. The Board could find no evidence that the lead hand intended that the grievor be disciplined. She was disciplined because the supervisor's orders were disobeyed. It was pointed out that by the date of the hearing, the warning slip had almost expired anyway, such discipline remaining on file one year only. The Board suggested the duties of the lead hand be more clearly specified in the next collective agreement.

DISSENT: Mr. Yetman felt that the lead man had wrongly been involved in discipline since the grievance would not have occurred if he had not called upon the supervisor.

DECISION: 84-67

IMP Group Limited AND IMP Aerospace Employees Association

Milton J. Veniot, Arbitrator

Norbert MacEachern, for the union
L. Beaulieu, for the employer
July 12, 1984

ISSUES: Organization and Direction of the Work Place: Revision of Classification and Rates 5:2440; The Collective Agreement: Management Rights 4:2310.

CIRCUMSTANCES: The company had instituted a new job classification with a new wage rate. It notified the association of its intention to do so, and entered into negotiations with the association on an agreeable format. Those negotiations did not resolve the matter and the association filed a policy grievance.

The company pointed to its management right under the collective agreement and pointed out that it had followed the appropriate procedure for initiating a new classification. The association argued that the collective agreement was violated because the action did not "promote harmonious relations with the association" as stipulated in the agreement. It argued that requirements for the classification existed in the present agreement and therefore was not a new classification regarding new skills. The company called attention to the fact that part of the operation had been reconstructed thus necessitating a new classification.

AWARD: The grievance fails. The arbitrator could not agree that harmonious relations were not being promoted because of a disagreement. He interpreted the clause as binding the company to act in a fair, even-handed manner, which it had. As a new job, it became a subject of negotiation, which took place as needed. The company acted in good faith and the information of a new classification was a legitimate exercise of management rights.

DECISION: 84-68

Maritime Beverages Limited AND Teamsters, Chauffeurs, Warehousemen, Helpers and Miscellaneous Workers Credit Union, Local 927

Claude H. Folsy, Chairman; Barney Dobbin; Donald H. McDougall

Ron Pink, for the union
Eric Durnford, for the employer
July 18, 1984

ISSUES: Discipline: Leave Work Without Permission 7:3130; Discipline: Reasonableness of the Penalty 7:4300; Discipline: Employer Conduct: Discrimination 7:4414.

CIRCUMSTANCES: The two grievors were requested to leave the soft drink bottling plant where they were normally employed and fill in on the assembly line of the employer's bottling plant next door for an hour. The grievors were accustomed to taking their lunch break at 12:00 noon although the plant where they were substituting did not break for lunch until 12:15 p.m. When no one came to relieve them at noon, the grievors became anxious that they would miss the lunch wagon. They left their job on the assembly line without informing the production foreman whom they could not find. As a result, the assembly-line backed up, equipment jammed and a fire broke out. Products were lost and much cleaning up was required.

The grievors were suspended for one day as discipline. The union argued that the penalty was too harsh because four years earlier employees who had caused a similar incident were merely "spoken to".

AWARD: The Board distinguished the authorities arguing for consistency in discipline from the present case. This was not a case where two employees were treated differently for events which occurred at the same time. Although the company had not acted consistently with the discipline of four years earlier, it was not a question of rules or established policy such as a collective agreement or policy manual. It cannot be said that the grievors relied on the incident to their detriment since they were unaware of it. However they were aware that leaving the assembly-line without permission was unacceptable. Therefore, the penalty was justified.

AUTHORITIES: Brown and Beatty: Canadian Labour Arbitration, 7:4414 - Discrimination. Etobicoke General Hospital (1977), 15 L.A.C. (2d) 172 (Brandt). Goodyear Canada Ltd. (1977) 14 L.A.C. (2d) 340 (Burkette). Oshawa General Hospital (1975) 8 L.A.C. (2d) 329 (Weatherill). Palmer: Canadian Labour Arbitration (2d ed.), pp. 280-281 (sic).

DECISION: 84-69

Air Canada AND Canadian Air Line Flight Attendants Association

Innis Christie, Arbitrator

Luc Grenier, for the union
Pierre DesCoteaux, for the employer
July 13, 1984

ISSUES: Insufficient and/or Careless Work 7:3520; Penalties For Work-related Misconduct: Warnings, Suspension, Discharge 7:3542.

CIRCUMSTANCES: The employer stated that the grievor, a purser and "in-charge" flight attendant, was charged with negligence in duties to be performed during a landing of flight 861 which resulted in a possible dangerous situation for passengers and crew. The employer received a written complaint from four flight attendants because, in their opinion, the flight landed with the passenger cabins in a state of unpreparedness which put the safety of the flight attendants and the crew in jeopardy. It is the responsibility of the purser to give adequate warning of an imminent landing.

The union alledged the employer imposed disciplinary suspension without just and proper cause. The union asked that reference to the incident be removed from the employer's files, that the grievor be reinstated and paid all monies lost.

AWARD: The grievor had an obligation to carry out a landing safety check, to monitor the cabin crew in carrying out their responsibilities and to communicate effectively with them. The arbitral jurisprudence makes it clear that safety related employment offences are commonly held to justifiably attract discipline more readily than if safety is not involved. Considering the jeopardy in which the grievor's careless action, or inaction, placed not only fellow workers but also the travelling public and considering the grievor held a senior and responsible position the employer was correct in imposing a disciplinary penalty based on job negligence. The grievance was dismissed.

AUTHORITIES: Corporation of the City of Brampton (1978) 19 L.A.C. (2d) 237 (O. B. Shime, Q.C.) p. 239. Palmer, Collective Agreement Arbitration in Canada (2d - 1983) p. 363-4. Brown and Beatty, Canadian Labour Arbitration (2d) para 7:3520. Slater Steel Industries Ltd. (1975) 8 L.A.C. (2d) 135, p. 138.

DECISION: 84-70

Stan's Electrical Limited AND International Brotherhood of Electrical Workers, Local 1852

Judge Robert F. Ferguson, Arbitrator

T.J.K. Gillis, Q.C., for the union
Frank Elman, Q.C., for the employer
July 25, 1984

ISSUES: Union Security 9:1200; Assignment of Work Outside the Bargaining Unit 5:1000.

CIRCUMSTANCES: Two non-union workers were employed at a unionized construction site. The union grieved against the company for non-compliance with the Cape Breton Island, Nova Scotia Multiple Trade Collective Agreement. They requested compensation for lost wages. The company claims there were no suitable union workers available at the time.

AWARD: The grievance failed. The non-union workers were procured by the company in accordance with the Collective Agreement given the accepted practice at the time of hiring.

DECISION: 84-71

Sivaco Maritimes, A Division of Ivaco, Inc. AND United Steelworkers of America, Local 8679

S. Bruce Outhouse, Arbitrator

Winston Ruck, for the union
David Bright, for the employer
July 10, 1984

ISSUES: Recall of Persons on Lay-off 6:2350; Unauthorized Absence: Abrogation of Seniority Rights 7:3114; Time Limits 2:3128.

CIRCUMSTANCES: Two preliminary issues were raised. Firstly, the union took the position that the case involved discipline and requested a direction that the onus was on the employer to prove just cause. The second issue arose out of a timeliness objection by the employer. Both objections were dismissed. The grievor, who was on layoff, received a telephone recall to a position of lower classification. The employer terminated the employment of the grievor after he was absent for a three day period without notice, permission or valid reason. The union asked that the grievor's position on the recall list be reinstated. The union contends that an official registered letter had not been issued and therefore the grievor had not actually failed to report to work.

AWARD: The grievor was, at all material times, on lay-off and never regained active employment status. The grievor was not put on payroll nor was the usual documentation completed with respect to his return to work. The employer was directed to reinstate the grievor to the seniority list and extend his rights to recall. No compensation was ordered.

DECISION 84-72

Richmond District School Board AND The Nova Scotia Teacher's Union

Michael B. Sherar, Arbitrator

George M. Mitchell, for the union
Helenanne Carey, for the employer
July 26, 1984

ISSUES: Estoppel: The Doctrine 2:2210; Individual Contract of Employment 2:1210.

CIRCUMSTANCES: In accordance with the Education Act, the last teacher to be terminated on the grounds of insufficient school enrollment by the school board shall be the first to be rehired when a vacancy occurs. The grievor had her contract terminated in April 1983, effective July 1983. A vacancy occurred in June 1983, and the grievor was told she was rehired on a permanent contract by the School Board Administrator. The grievor withdrew action against the July termination and also turned down job possibilities from other school boards. Later the Administrator found he had misinterpreted the type of contract, which was actually for only one year. The grievor refused to sign the contract when she received it several weeks after the disputed school year began. The union on behalf of the grievor, requested reinstatement of her permanent contract without loss of seniority.

AWARD: The position which the grievor occupied was deemed to be a vacant position and not a contract position. The grievor was granted a permanent contract and the school board was directed to revise her employment records to state that there had been no interruption in her permanent contract.

AUTHORITIES: O'Neill v. Canadian National Railways et al (1980) 43 N.S.R. (2d) 215. Brown and Beatty, Canadian Labour Arbitration, 2nd ed. p. 51. B.C. Forest Workers and International Woodworkers Union (1983) 8 L.A.C. (3d) 218. Re School District No. 24, Kamloops and Canadian Union of Employees (1981) 29 L.A.C. (2d) 93. Hawker Siddeley v. Steelworkers (1983) 59 N.S.R. (2d) 29. Durham-Bush of Canada and United Steelworkers, Local 3998 (1983) 9 L.A.C. (2d) 401. Metropolitan Toronto Police Assoc. et al v. Metropolitan Toronto Board of Commissioners of Police (1972) 2 O.R. 793, 26 D.L.R. (3d) 672 (Ont. C.A.), affd 45 D.L.R. (3d) 548, 2 N.R. 95 (1975) 1 S.C.R. 630 (S.C.C.).

DECISION: 84-73

Associated Freezers of Canada Limited AND Retail, Wholesale & Department Store Union, Local 1015

Innis Christie, Arbitrator

Terry Roane, for the union
Brian G. Johnston, for the employer
July 25, 1984

ISSUES: Status of Persons on Layoff 6:2352; The Collective Agreement: Interpretation 4:2000; Illness: Benefits and Other Rights 8:3300.

CIRCUMSTANCES: The union, on behalf of the grievor, requested the payment of sick leave benefits accumulated during a six month period of lay-off.

AWARD: In light of the benefit scheme under the collective agreement and considering the purposes of sick pay benefits, as well as the wording of all relevant provisions of the collective agreement, sick pay benefits do not apply to employees on lay-off. The grievance was denied.

AUTHORITIES: Peterboro Lock Manufacturing Co. Ltd. (1953), 5 L.A.C. 1617, p. 1620 (Gale). Canadian Arsenal Limited (1970), 22 L.A.C. 1, p. 4 (Shime). Andres Wines (B.C.) Limited (1977), 16 L.A.C. (2d) 422, p. 429 (Weiler). Northern Electric Co. Ltd. (1972) 1 L.A.C. (2d) 310, p. 312 (Weatherill). Northern Telecom Canada Ltd. (1981) 2 L.A.C. (3d) 105, p. 109 (Burkett).

DECISION: 84-74

City of Halifax AND The Halifax Police Officers and N.C.O.'s Association

S. Bruce Outhouse, Chairman; Ronald J. Downie, Q.C.; Matthew J. MacPherson

Karen McCaskill, for the union
Gerald Goneau, for the employer
Ronald Pink, for the promoted employee
July 30, 1984

ISSUES: Applications of Seniority: Promotion 6:2100; The Skill and Ability Requirement: The Scope of Arbitral Review 6:3100; Remedial Authority of the Arbitrator: Promotions 6:4100.

CIRCUMSTANCES: The grievor was a corporal with the Halifax Police Department. His union alleged that the employer violated the collective agreement by raising another corporal, who had less seniority than the grievor, to the ranks of sergeant. The collective agreement states that promotions should be based on seniority "where all other factors of skill and ability are equal". The union argued that an increase in ranks was a promotion within the meaning of the collective agreement. Therefore, the grievor should have been made a sergeant before his fellow corporal was promoted, unless the promoted man had greater overall ability as a police officer. The employer submitted that the promoted man was more qualified for the position to which he had been appointed. The promotion had been given only because the position needed the authority of a sergeant. Even if the promoted man had no more overall ability as a police officer than the grievor, his greater ability with respect to the position gave him greater "skill and ability". Counsel for the promoted man supported the employer's position and added that, in any case, the promoted man had greater general ability as a police officer.

AWARD: The Board upheld the grievance in part. In a close case an arbitration board should defer to the employer's assessment of skills and abilities unless the employer has been unfair or influenced by irrelevant considerations. The main issue in the present case, however, was whether the phrase "skill and ability" in the collective agreement referred to overall ability as a policeman (the union's view) or to the skills needed for the position to which a promoted officer is assigned (the employer's position). The Board decided that the word "promotion" in the collective agreement referred to an increase in ranks, and that the assessment of skill and ability must be made in relation to the general duties of the ranks, rather than the requirements of a particular position. Because the general police skills of the grievor were at least equal to those of the promoted officer, the promotion had been made in violation of the collective agreement. In addition, the Board found that the employer had been influenced by the grievor's value to the Department in his present position. This consideration clearly was irrelevant to either an assessment of general ability or an assessment of suitability for a particular opening. Therefore, even if the employer's interpretation of the collective agreement was correct, the employer breached the collective agreement by applying a criterion which was outside the scope of the agreement.

The union wanted the promotion cancelled, but did not ask for a reposting of the promoted man. Yet the position in question needed at least the ranks of sergeant. The Board, therefore, froze the promoted man's seniority as sergeant until all the corporals who were senior to him prior to his promotion were themselves promoted or passed over for legitimate reasons. The Board thereby prevented a violation of the Collective Agreement from affecting the future seniority of corporals who were senior to the promoted man.

AUTHORITIES: Canadian Food and Allied Workers, Local 175 v. Great Atlantic and Pacific Company of Canada Ltd. et. al. (1976) 13 L.A.C. (2d) 211n (Brandt); Re City of Toronto and C.U.P.E., Local 43 (1978), 17 L.A.C. (2d) 304 (Kates); Re University Hospital and London and District Service Workers' Union, Local 220 (1979), 25 L.A.C. (2d) 134 (Brandt); Re Douglas Aircraft Company of Canada Limited and United Automobile Workers, Local 673 (1979), 22 L.A.C. (2d) 208 (Brown); Re Governing Council of the University of Toronto and Service Employees Union, Local 204 (1981), 30 L.A.C. (2d) 187 (Palmer); Re Elizabeth Bruyere Health Centre and Ontario Nurses' Association (1982), 6 L.A.C. (3d) 119 (Saltman), Palmer, Collective Agreement Arbitration in Canada (2d), p. 511-512, Re U.A.W. and Westeel Products Limited 1960, 11 L.A.C. 199 (Laskin), Re Lady Gault Towels Limited (1969), 20 L.A.C. 382 (Christie), Re University of British Columbia and C.U.P.E., Local 116 (1982), 5 L.A.C. (3d) 69 (Munroe); Re Zubryck and the Crown in Right of Ontario... (1979) 22 L.A.C. (2d) 157 (Adams); Re Gilbarco Canada Ltd. and Canadian Union of Golden Triangle Workers (1973) 1 L.A.C. (2d) 348 (Carter), Brown and Beatty, Canadian Labour Arbitration (2d), p. 305-306.

* This decision was appealed to the Supreme Court. Summary of Decision (S.H.49477) will be published in 1985 compendium as 84-74A.

DECISION: 84-75

Sobey's Stores Limited AND United Food and Commercial Workers Union, Local 1973

S. Bruce Outhouse, Arbitrator

Ronald A. Pirk, for the union
Bruce T. MacIntosh, for the employer
July 30, 1984

ISSUES: The Hearing: Preliminary Matters: Change of Position 3:2200; Admissibility of Evidence 3:4000; Alteration of Grounds for Discipline 7:2200; Grounds for Discipline: Attendance at Work 7:3100; Grounds for Discipline: Innocent Absenteeism 7:3210; Disciplinary Penalties: The Final Incident 7:4312.

CIRCUMSTANCES: Th grievor was suspended for three days in mid-March of 1984 because of absences on February 9 and March 6. He had a poor attendance record for 1983 and the latter part of 1982. Although he was paid sick leave benefits for February 9 and March 6, the employer suspected sick leave abuse. At the hearing, the employer alledged sick leave abuse as a basis for the suspension. The employer also relied on the doctrine of culminating incident with respect to the grievor's record of absenteeism. The union submitted that the grievor had a valid reason - illness - for being absent on March 6 and February 9.

AWARD: The grievance succeeded. The employer had failed to prove that the grievor was guilty of sick leave abuse in relation to the absences for which discipline had been imposed. The onus of proving just cause in discipline cases is on the employer. The grievor is to be fully compensated for all wages and benefits lost during the period of suspension.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration (2d), at p. 342-343, 475.

DECISION: 84-76

City of Haliux AND Halifax Civic Workers, Local Union

Judge J. A. MacLellan, Chairman; Gregory North; Joe Ross

Charles MacDougall, for the union

Gerald Goneau, for the employer

August 20, 1984

ISSUES: Onus of Proof: Discharge and Discipline 3:2400, 3:2411; Innocent Absenteeism 7:3210; Inability to Discharge Employment Obligations 7:3220; Alcoholic Beverages 7:3560.

CIRCUMSTANCES: The grievor was dismissed on April 11, 1984 for undue absenteeism and failure to complete a mandatory alcohol rehabilitation program. The employer had ordered the grievor to enter the program in response to a medical assessment of the grievor's condition. The employer's right to require the grievor to participate in this program, on pain of dismissal, was not challenged. The grievor had a history of above-average absenteeism dating back to the mid-1970's. Much of this absenteeism was caused by alcohol abuse.

The grievor was illiterate and inarticulate. He alleged at the hearing that he did not realize that he would be fired if he failed to complete the rehabilitation program.

AWARD: A majority of the Board decided to reinstate the grievor within one week after the parties received the written decision. The majority believed that the grievor did not appreciate the mandatory nature of the program. Therefore, he was given a second chance to take the program of rehabilitation on pain of dismissal. The employer, however was not required to compensate him for lost pay and benefits. The reinstatement was subject to completion of the program and of any additional steps recommended by program administrators. Furthermore, the majority stated that if the grievor was absent from work due to consumption of alcohol at any time during the following two years, then the employer could fire him immediately.

DISSENT: North stated that an employee can justifiably be dismissed for innocent absenteeism if (a) there is a record of undue absenteeism, and (b) the grievor is unable to attend work regularly in the future. Once the employer proves the first condition, the onus is on the employee to prove that attendance will be regular in the future. In the present case, the grievor was unwilling to complete the rehabilitation program even though he was advised that failure to do so would cost him his job. In addition, professionals in the treatment of alcohol addiction, who dealt with the grievor, concluded that he was unwilling to accept treatment, in spite of several efforts to assist him over the past few years. The evidence did not indicate that attendance would be regular in the future. Therefore, the dismissal should have been upheld.

AUTHORITIES: Amalgamated Transit Union, Local 408 and Metropolitan Transit Commission (July 22, 1982, unreported at p.2); Re U.A.W., Local 458 and Massey - Ferguson Industries Limited (1972), 24 L.A.C. 344 (Shime) at p. 348; Re Niagara Structural Steel (St. Catherine's) Limited and United Steelworkers, Local 7012 (1978), 18 L.A.C. (2d) 385 (O'Shea).

DECISION: 84-77

Canada Post Corporation AND Association of Postal Officials of Canada

Innis Christie, Arbitrator

Jacques A. Emond, for the union
Ross C. Dumoulin, for the employer
July 31, 1984

ISSUES: Onus of Proof: Discipline and Discharge 3:2411; Standard of Proof: Criminal Misconduct 7:2500; Grounds for Discipline: Dishonesty 7:3300; Grounds for Discipline: Theft 7:3310; Grounds for Discipline: Criminal Conduct 7:3420; Disciplinary Penalties: Mitigating Factors 7:4400.

CIRCUMSTANCES: The grievor was temporarily suspended and then discharged for falsifying Post Office financial documents and converting Post Office funds for his own use. The missing amount was \$6,880.94. The grievor had been employed in the Sydney Mines Post Office since 1960, where he had been assistant postmaster since 1965. He was 49 years old and married, with three children still living at home. His wife did not work for health reasons. His health was not very good. Although there was no evidence that he was a particularly good employee, his record had only one previous instance of discipline - a 2 1/2 day suspension for drinking on the job. For some time, he carried a disproportionate amount of work at the Post Office.

The grievor did not deny falsifying financial accounts. He alleged, however, that he had not stolen any money.

AWARD: The arbitrator concluded that over a number of months the grievor stole funds from the employer. In support of this conclusion, the arbitrator emphasized the grievor's low credibility, his admission that he falsified the financial records, and his prior admission to the employer's manager of Preventive Security (Atlantic Division), that he had taken some funds from the Post Office. Because the employer had alleged a criminal act as the "just cause" for discipline, the employer had to present "clear and convincing" evidence of the allegation. The employer met this standard of proof and thereby discharged the onus of proving just cause.

The abritrator also concluded that discharge was a "just and reasonable" degree of discipline for the offence in question, in spite of the grievor's personal circumstances, his long and relative good record of employment and the bleak job prospects in Sydney Mines. The arbitrator emphasized that the

grievor had held a senior position of trust when he deliberately defrauded the employer over an extended period of time. Even if the grievor had only falsified financial documents, discharge may well have been "just and reasonable".

AUTHORITIES: Woods (1983), L.C.U.C. No. L-26-83-1, C.P.C. No. 83-1-6-21 (Christie), at p. 11-13, Atkey (25 Nov. 1983-Adams) at p. 26.

DECISION: 84-78

Cape Breton Development Corporation AND United Mine Workers of America,
District 26, Local 4522

Innis Christie, Arbitrator

Don MacDonald, for the union
Arthur Pickup, for the employer
August 1, 1984

ISSUES: Prior Award 2:3220; Interpretation of Collective Agreement:
Statutes 4:2230; Assignment of Work Outside the Bargaining Unit 5:1000;
Notice of Lay-Off 6:2320.

CIRCUMSTANCES: In early October of 1983, an illegal strike by some members of the union shut down the employer's operations at its Victoria Junction coal preparation plant and two coal mines. At 11:00 p.m. on October 5, the employer decided to shut down its railway operation the next day. Hourly announcements were broadcast on local radio and television to inform 92 sectionmen, who were scheduled to report for work, that there was no work for them on October 6. Apparently, none of them heard the late night announcements. They all reported for work on October 6 and were sent home.

Another group of workers continued to work. They were employed by Municipal Ready Mix Co. Ltd. pursuant to an agreement between the employer, Municipal Ready Mix and the Unemployment Insurance Commission whereby unemployed miners were given work for 12 weeks clearing brush and removing old track. The union had approved this agreement. There was no evidence that these workers did any work which otherwise would have been done by sectionmen.

The grievance raised three issues. 1) Was the lay-off on October 6 a "lockout" under Article 5 of the collective agreement? 2) Was the lay-off instituted without the notice required by Article 33? 3) Did the continued employment of the Municipal Ready Mix workers on the employer's premises constitute a violation of the collective agreement?

AWARD: The Board found that sectionmen had been laid off for the purpose of pressuring the union to end its illegal strike. This finding was based primarily on the timing of the layoff and the absence of any legitimate business reason for ceasing operations on October 6. The Board held that a layoff for this purpose was a "lockout" within the meaning of Article 5, which generally prohibits strikes or lockouts during the term of the

collective agreement. In reaching this conclusion, the Board applied the definition of "lockout" in Section 107 of the Canada Labour Code, and rejected the view that a lockout under this section only arose where the employer was attempting to compel the locked out employees to make bargaining concessions. In the Board's opinion, Section 107 covered an attempt to put pressure on one group of employees by locking out another group which had a separate collective agreement. This was the situation in the present case. The Board's view was contrary to a previous arbitration decision concerning the employer and C.U.P.E., in which the arbitrator adopted the narrow interpretation of Section 107 mentioned above. The Board held that it was not bound by the previous decision.

Alternatively, the Board decided that the employer failed to give sufficient notice of the lay-off, and thereby breached Article 33, which required that, in the context of a strike in the industry, the employer still must give "as much advance notice as possible".

With respect to the Ready Mix employees, the Board held that their work on October 6 did not give rise to a violation of the collective agreement.

The employer was ordered to pay the 92 sectionmen full compensation for loss of one day of work on October 6.

AUTHORITIES: Palmer, Collective Agreement Arbitration in Canada (2d), at p. 728, Re Robb Engineering and United Steel Workers of America, Local 4122 (1978), 86 D.L.R. (3d) 307; Canada Labour Code, s. 107; British Columbia Railway Company (1978), 76 C.L.L.C. para 16,028 (Baigent, Vice-Chairman); Re Manitoba Food and Commercial Workers Union, Local 832 and Canada Safeway Limited (1981), 120 D.L.R. (3d) 42, at p. 48, Note - (1981) 123 D.L.R. (3d) 512.

- * This decision was affirmed by the Nova Scotia Supreme Court (S.H.49526) but was overturned by the Nova Scotia Supreme Court Appeal Division (S.C.A.01450). Summaries of these decisions will be published as 84-78A and 84-78B in the 1985 Compendium.

DECISION: 84-79

Isle Royale Beverages, Ltd. AND Retail, Wholesale and Department Store Union, Local 596.

Judge J. A. MacLellan, Chairman; George Khatter; Gilbert MacIntyre

Bernie Campbell, for the union
Frank L. Elman, Q.C., for the employer
August 24, 1984

ISSUES: Discipline and Discharge: Standard of Proof: Criminal Misconduct 7:2500; Work Performance: Incompetence 7:3510; Unsuitability 7:3530; Penalties for Work Related Misconduct: Warnings, Suspensions, Discharge 7:3542; Personal Appearance 7:3550.

CIRCUMSTANCES: The grievor was dismissed from his employment as the driver-salesman of a pre-mix truck. He had worked as a helper on the bottle and the pre-mix trucks before assuming this new job and increase in responsibilities. He is the only driver who has a dual role as driver/salesman.

Shortly after assuming this new job, the grievor received repeated warnings from his employer and finally his shop steward about his poor job performance. He was threatened with dismissal if his careless attitude toward inventory and cash deposits did not change. He indicated he would improve but, in fact, was found continually negligent, which led to his dismissal. The grievor admitted, under cross examination, that his performance had been poor.

AWARD: The grievance is dismissed, the discharge being upheld. The company was seen to have given the grievor ample opportunity for improvement and sufficient warning of the consequences if he did not. The grievor's explanation for his failure to make deposits on time was found unacceptable, especially in light of his admission that he was careless at times about his work and appearance.

DISSENT: MacIntyre agrees with the decision not to reinstate the grievor at his former position. However, questioning the standard of proof used, and advocating "reasonable probability" as a preferable standard, he argues for reinstatement at some lesser position following a temporary suspension.

AUTHORITIES: Allen Industries Canada Ltd., (1971) (Weatherhill); Nova Scotia Liquor Commission, (1974) (Richards); Ford Motor Company, (1975) (Ferguson).

DECISION 84-80

The Pictou District School Board AND Canadian Union of Public Employees, Local 867.

S. Bruce Outhouse, Chairman; Michael Tynes, John Howatson

A. K. Cunningham, for the union
Bruce MacIntosh, for the employer
August 28, 1984

ISSUES: Seniority: Acquisition and Termination 6:1000; Applications of Seniority 6:2000; Past Practice 3:4430; Dictionaries 4:2210; Skill and Ability: Senior Employee With Required Ability 6:3210.

CIRCUMSTANCES: The union grieved that sections of the collective agreement had been breached because the senior applicant was denied employment as driver of the special bus for handicapped (disabled) children and that past practice by the employer had established her seniority. The grievor fulfills her present duties as regular driver/janitor satisfactorily and has proven her abilities in this regard. The new job posting did not indicate that special qualifications were required. The union argues that under the language of the collective agreement, the employer is not entitled to subjective assessment of ability and qualifications.

The employer questions the grievor's seniority, arguing that it is the actual date work commenced and not the date of appointment to the job which determines seniority. They deny that their longstanding policies for establishing seniority have been consistent with the language of the collective agreement and wish to clarify the language used in the agreement. In addition, the employer questions the grievor's ability to perform the special duties required when dealing with "special" children due to her temperament, personality and health.

AWARD: The grievance succeeds. The grievor's seniority rights are substantial and she possesses the basic qualifications and ability required for the job. The employer has not presented reasonable explanations concerning lack of ability and suitability. The language of the collective agreement is seen to be clear in this regard.

AUTHORITIES: The Concise Oxford Dictionary (6d); Black's Law Dictionary (4d), p. 622; Words and Phrases (3d), Vol. 2, pp.23-25; Dominion of Canada Guarantee and Accident Insurance Company v. Mahoney, (1929) 4 D.L.R. 823 (S.C.C.); Lee S. Hino et al v. Green et al., (1927) 4 D.L.R. 279 (Sask. C.A.); Brown and Beatty, Canadian Labour Arbitration (2d), p. 308,328; Halifax Police Officers and N.C.O.'s Association and the City of Halifax, (July 1984) (unreported).

DECISION: 84-81

Board of Governors of the Technical University of Nova Scotia AND
Technical University of Nova Scotia Faculty Association

S. Bruce Outhouse, Arbitrator

N. Blaise Macdonald, for the union
Eric Durnford, for the employer
August 24, 1984

ISSUES: The Collective Agreement: Matters Arising Outside of 2:3200;
Secondary Sources of Jurisdiction: Statutes 2:2100; Merit Increases 8:2310;
Educational or Experiential Increments 8:2330; Policy Grievances 2:3124.

CIRCUMSTANCES: The grievance was filed to determine whether the employer is complying with the pay provisions of the collective agreement as amended by the Public Sector Compensation Act. The Association's position states that the Board's amendment effects only the "percentage increment" not the "normal performance increment" and "special merit increment" for faculty, or the "career development increment" for librarians. The Association asserts that the employer is violating the collective agreement by offering a "global percentage" which includes all categories for increment. The employer maintains it is this total which cannot exceed the Board's restraint limit, and that each member of the bargaining unit receives six per cent more than was received in the previous year. Therefore, they maintain they are not in violation of the collective agreement as amended by legislation.

AWARD: The grievance succeeds. The Act limits salary increases to six per cent and identifies types of increases not regarded as ordinary and therefore not subject to the six per cent limit. The types considered here are not restrained by the legislation or the Public Sector Compensation Board.

DECISION: 84-82

V S Services, Limited (Food Management Services) AND Canadian Union of Public Employees, Local 2336.

S. Bruce Outhouse, Arbitrator

James Crosby, for the union
Richard Ellis, for the employer
August 27, 1984

ISSUES: Statutory Holidays: Work on Day of Holiday 8:3130; Evidence: Past Practice 3:4430; Policy Grievance: Limitations Imposed by Agreement 2:1100.

CIRCUMSTANCES: The grievance alleges that the employer is violating sections of the collective agreement which deal with holiday pay for full and part-time employees. The employer acknowledges that the circumstances of the union's position are correct, but the employer denies any breach. In the past, employees received payment according to the terms of earlier agreements. Commencing in 1980, full-time employees were denied the option for payments and allowed only alternate holiday time. The union has attempted to clarify the option for payment in lieu of time off in contract negotiations, but the employer will not alter existing contractual language. The policy grievance has been filed to obtain a definitive interpretation of the articles in the collective agreement.

In the case of part-time employees who have never received the time-off option, the question arises as to whether their holiday pay should be calculated on a straight-time or time-and-a-half basis.

AWARD: The grievance fails. The employer is found to be nondiscriminatory in its interpretation of the language in the collective agreement. It is found that the employer has the right to select whichever option it chooses.

The issue of holiday pay for part-time employees is also found in the employer's favour. The method of calculation is reduced to a mathematical formula, and is clear.

The language of the agreement is clear, and therefore claims of past practice were not germane.

AUTHORITIES: Twin Cities Cooperative Dairy Ltd. and Teamsters Union, Local 927, (1980) 26 L.A.C. (2d) 215 (Christie).

DECISION: 84-83

City of Dartmouth AND Dartmouth Firefighters Association, Local 1398,
International Association of Firefighters

Innis Christie, Arbitrator

G. J. McConnell and Richard Bureau, for the union
Michael Moreash, for the employer
September 6, 1984

ISSUES: Arbitrability: Subject Matter Limitations 2:1100; Submission to
Arbitration 2:1300; Evidence: Extrinsic Evidence 3:4400; Negotiating
History 3:4420; The Object of Construction: The Intention of the Parties
4:2100.

CIRCUMSTANCES: Both parties are currently in negotiation for a new
collective agreement. The union has requested an arbitrator in order to
obtain a clarification and statement of intention pertaining to a clause in
an expired agreement. This clause relates to the comparative rates of pay
for firefighters and policemen. The employer argues that the arbitrator
does not have jurisdiction to rule on the parties' intent and objects to
admissibility of any extrinsic evidence for clarification.

AWARD: The arbitrator has declared that he has no jurisdiction pertaining
to the clause beyond the termination of the present collective agreement.
Extrinsic evidence has not disclosed any mutual intent of the parties
involved.

AUTHORITIES: I.B.E.W., Local 2345 v. Noranda Metal Industries Ltd., Fergus
Division (1983), 84 C.L.L.C. para 14, 024 (Dubin); Public Sector
Compensation Act.

DECISION: 84-84

Enheat Inc. AND United Steelworkers of America, Local 6874

Judge J. A. MacLellan, Arbitrator

Gerald J. McConnell, for the union
C. Peter MacLellan, for the employer
September 11, 1984

ISSUES: Vacation: Computation of Vacation, Period of Service 8:3220;
Vacation Pay 8:3230; Strikes and Lockouts: Status of Striking Employees,
Service for Vacation 8:3220; Interpretation: Words and Phrases, Length of
Service 6:1110.

CIRCUMSTANCES: The parties agreed to submit to arbitration the unresolved
issue of vacation pay credits which arose in reaching a new Collective
Agreement.

The union argues that employees are entitled to vacations depending on their "length of service" as defined by the Collective Agreement. The employer does not dispute that vacation entitlements are calculated on the basis of length of service or that time spent on lockouts does not affect this but rather that as the Collective Agreement is silent as to pay during the vacation period the employer may pro-rate the pay to account for time not worked by a lockout.

AWARD: The grievance succeeds. The decision is governed by the words of the Collective Agreement. To accept the employer's position would stretch the meaning of the words "vacation with pay" beyond the breaking point. This is especially so in that these are salaried employees and the Collective Agreement refers to "continuous employment" in other contexts where it uses the concept of actively at work as a basis of measurement. The company is to reimburse all employees who were pro-rated vacation pay entitlements during the period of lockout.

DECISION: 84-85

Brookfield Foods Limited AND Retail, Wholesale & Department Store Union,
Local 1015

Judge J. A. MacLellan, Arbitrator

Kenneth Hennick, for the union
James Leefe, for the employer
September 24, 1984

ISSUES: Management Rights, Schedules 5:3000; Working Hours and Shifts, Definition of 5:3100; Transfer Between Shifts 5:2000; Arbitrability, Grievance as Limitation On 2:3000; Past Practice 3: 4430.

CIRCUMSTANCES: The employer changed the work week from a Monday to Friday to a Tuesday to Saturday. The union grieves, arguing that the past practice of a Monday to Friday work week has become incorporated into the Collective Agreement by the clause preserving such rights, etc. which existed previously and are not contrary to the Collective Agreement.

The employer argues that it retains the right to reschedule work under its management rights clause where, as here, it is in response to a temporary situation caused by a mechanical failure. It also argues that no fixed work schedule ever existed.

AWARD: The fact situation creating this grievance is temporary and may by the time the Award is received by the parties no longer exist. In these circumstances the union is refused the request to amend the grievance to include claims for lost wages. As such it is not necessary to rule on the respective rights in question as the point is now or soon will be moot.

DECISION: 84-86

Camp Hill Hospital AND The Public Service Alliance of Canada

Judge J. A. MacLellan, Chairman; Donald H. McDougall; David P. Reynolds

Derek Dagger, for the union

Brian G. Johnston, for the employer

August 1, 1984

ISSUES: Discipline and Discharge: Alteration of Grounds 7:2200; Attitude 7:3580; Carelessness 7:3520; Insolent Behavior 7:3660; Leaving Work Without Permission 7:3130; Disciplinary Penalties: Culminating Incident 7:4310; Disciplinary Record 7:4310; Progressive Discipline 7:4422; Evidence, Admissibility Relevance 3:4200; Exclusionary Rules 3:4300.

CIRCUMSTANCES: The grievor disputes three disciplinary acts of the employer; a 3 1/2 day suspension, a 10 day suspension and his discharge.

The employer argued that four separate incidents of failure to obey policy justified the first suspension. The grievor contested the factual situation presented by the employer.

The employer argued that the second suspension was justified by another failure to follow department policy on receiving and distribution of alcohol. Again the grievor contests the facts as presented by the employer.

The employer supports the termination by reference to two incidents of sarcastic and antagonistic behavior, an incidence of carelessness and a failure to improve his behavior as instructed at his previous disciplinary hearing. The grievor contests the facts in the first two, admits to carelessness and asserts the penalty was not justified.

AWARD: The first grievance fails. The Board rejected the grievor's testimony on three counts but accepted his explanation for the fourth. Nonetheless, the penalty was upheld.

The second grievance fails. The Board rejected the grievor's testimony and upheld the penalty.

The third grievance fails. The Board rejected the grievor's testimony on the first three events. The Board held that in light of the grievor's previous letter of reprimand for poor attitude and behavior, his suspensions, and his deteriorating evaluations the employer was justified in concluding the grievor was an unsuitable employee. The grievor's work record constituted a culminating incident justifying discharge. The attitude problem of the grievor was manifest in his testimony and behavior before the Board.

DISSENT: Reynolds contends the majority were influenced by evidence that was not properly before the Board. Specifically, in one case the employer revealed information the grievor had assumed would be confidential. It was a process of character assassination.

The employer ought not to have been allowed to assert the new ground of unsuitability at the hearing. The evidence, i.e. the delay in reporting incidents, points to the employer building a file against the grievor to ensure his dismissal.

AUTHORITIES: The National Harbours Board and The Police Association of Nova Scotia, (March 27, 1981); Re Texport of Oxford Warehousing Ltd. and Teamsters Union, Local 938, (1980), 25 L.A.C. (2d) 111 at 1118; Brown and Beatty, Canadian Labour Arbitration (2 ed.) p. 475; Bruce Young, At the Point of Discharge, p. 197; Re Continuous Colour Coat Ltd., v. United Steelworkers (1975), 9 L.A.C. (2d) 326 (Abbott).

DECISION 84-87

The Nova Scotia Liquor Commission AND The Association of Commercial and Technical Employees, Local 1670

S. Bruce Outhouse, Arbitrator

Raymond F. Larkin, for the union
James Leefe and Robert Purdy, for the employer
September 20, 1984

ISSUES: Discipline and Discharge: Evidence, Confessions 3:4332; Burden of Proof 3:2411, 7:2300; Standard of Proof 3:2500, 7:2500; Grounds for: Theft 7:3310; Disciplinary Penalties, Mitigating Factors, Compassion 7:4427; Economic Hardship 7:4426; Employees State of Mind 7:4424; Employment Record 7:4428.

CIRCUMSTANCES: Upon investigating various discrepancies in the store's books the employer became convinced that the grievor or another employee, possibly both, was stealing money from them. The grievor was co-operative and in the second interview with the employer's investigators admitted to stealing money on some but not all of the occasions. The grievor was suspended for 20 days and demoted from the highest managerial level to warehouseman.

The union argues the employer has not established just cause for dismissal. It asserts that in alleging criminal conduct the employer must meet a more stringent standard. It also relies on psychiatric testimony to show that the grievor was suffering from depression and severe emotional problems which rendered his confession involuntary. In the alternative the union asserts the grievor's long and exemplary work record justifies a lesser penalty.

The employer argues the documentary evidence plus the confession make the only reasonable conclusion that the grievor stole the funds. It rejects the psychiatrist's testimony. It also rejects arguments of mitigation arguing the grievor was in a position of trust from which he could have justifiably been fired instead of suspended and demoted.

AWARD: The employer had just cause for dismissal. The confession was crucial in establishing that the grievor did steal the funds. In rejecting the psychiatrist's opinion on voluntariness, note must be made that it was based on inaccurate information, on no direct evidence dealing with the theft and was inconsistent with the grievor's actual behavior. The employer only has to meet the burden of proof on a balance of probabilities. It is well established, however, that the evidence will be weighed more carefully as the seriousness of the allegation increases.

The employer was justified in removing the grievor from a position of trust. In light of his past record, long service, age and financial impact of his permanent demotion the employer is directed to see if there is a higher non-trust position the grievor could occupy.

AUTHORITIES: Teamsters, Chaffeurs, Warehousemen and Helpers, Local 927 and Twin Cities Co-operative Dairy Limited, (Nov. 30, 1982).

DECISION: 84-88

Bolands Limited AND Bakery, Confectionary and Tobacco Workers International Union, Local 446

Elvin J. McNeil, Arbitrator

Rene Quigley, for the union
Gregory I. North, for the employer
September 28, 1984

ISSUES: Promotion, Demotion and Transfer: Demotion or Transfer, Fairness 4:2300; Nondisciplinary: Bona Fides 5:2300; Management Rights: Fairness 4:2300; Estoppel: Condonation 2:2220.

CIRCUMSTANCES: The grievor was transferred to another position with his job being taken over by the incumbent of this position. It is generally agreed that the grievor's old position was more desirable.

The union argues that the work assignment provisions in the Collective Agreement were not followed in this case. The employer asserts these provisions only apply to job vacancies and not to situations where two employees switch positions. The employer maintains it has the power to make such a shift for reasons of efficiency under its management rights clause. The grievor admits the change did result in improved efficiency. The employer also argues the union is estopped from grieving because it had not grieved on several previous transfers in similar circumstances.

AWARD: The grievance succeeds. There does not appear to be any distinct pattern of conduct or overt action or inaction by the union to support the argument of estoppel.

There is no argument as to the employer's good faith, but to allow its interpretation of the work assignment provisions would make useless the existence of seniority rights recognized by the Collective Agreement. To allow unilateral assignment of job positions would destroy the idea of regular positions to which seniority may be considered in assigning. In these circumstances the resulting increased efficiency is no defence. The employer is ordered to return the grievor to his position.

AUTHORITIES: Re Rolland Paper Co. and Canadian Paper Workers Union, Local 1284, (1981), 28 L.A.C. (2d) 321 at 331; Re United Steelworkers and Algoma Steel Corp. (1968), 19 L.A.C. 236 at 243; Re Windsor Public Utilities Commission and International Brotherhood of Electrical Workers, Local 911 (1974), 7 L.A.C. (2d) 380 at 382; Re Westrock Industries Ltd. and United Cement, Lime and Gypsum Workers, Local 366, (1973), 3 L.A.C. (2d) 102.

DECISION 84-89

Chateau Halifax AND Hotel, Motel, Restaurant, Bartenders, Construction Camps & Club Service Employees, Local 662

Judge J. A. MacLellan, arbitrator

Raymond Larkin, for the union
Eric Durnford and Sara Filbee, for the employer
October 1, 1984

ISSUES: Refusal to Follow Instructions 7:3610; Warnings, Suspensions, Discharge 7:3542

CIRCUMSTANCES: The grievor created a disturbance in front of customers at a small pub. The disturbance, over a minor issue, was between the grievor and the manager of the pub. At issue is whether the resulting penalty of discharge was warranted. The employer argues that the incident was a challenge to authority, that previous verbal warnings had been given and the grievor's outburst must not be trivialized. The grievor concedes that she was wrong to create the disturbance but the penalty of discharge is simply too severe and a penalty appropriate for the misconduct should be substituted.

AWARD: The dismissal of the grievor was found to be far too severe a penalty for the misconduct in question. The dismissal was substituted with a suspension of two months and the grievor was to be compensated for lost wages from that date and reinstated to her former position.

DECISION 84-90

Technical University of Nova Scotia AND the Nova Scotia Government Employees' Union

Claude H. Foisy, Q.C., John Yates, Donald McDougall

John Merrick and Kathleen O'Grady, for the union
Eric Durnford and Jamie Cameron, for the employer
October 1, 1984

ISSUES: Disciplinary Penalties: Warnings 7:4416; Lateness 7:3140;
Rehabilitative Potential 7:4422

CIRCUMSTANCES: Two day suspensions were given to two employees as penalty for lateness to work, extended coffee breaks and leaving work early. The union requested that the penalties be reduced to letters of warning and lost wages be paid. The union contends that the suspensions contradict the long-standing honour system that had been established between the supervisor and employees, that specifically discipline in gradual increments was not evident in the case.

Grievor A, a long-time employee, admitted that she had been late and had extended her breaks, but only in the last two weeks of November and that she had received only a casual verbal warning in August. Minute by minute harassment by a third employee (C) was the motive given by Grievor A for her behavior.

Grievor B joined Grievor A in her attempts to annoy employee C. Grievor B, though, had previously been suspended for lateness and absence from work.

The employer replied that the verbal warnings given to the employees in August were not casual. When the supervisor reported extended coffee breaks to his director in November the director interpreted the report to mean that the improper behavior had occurred since August. The Director then issued the suspensions.

AWARD: There were separate decisions for each grievor. Grievor A had received no formal warning notice, was unaware that her action would result in discipline and her work performance did not suffer. The well accepted principle of progressive discipline applies to this case and lead to the substitution of a written warning for the two day suspension.

In light of Grievor B's previous disciplinary penalties, it was deemed inappropriate to mitigate the two day suspension as it seems she knew her actions would result in discipline.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration (2d) para. 7:4400, 7:4416; 7:4422; Re Outboard Marine Corporation, 4 L.A.C. (2d) 83 (Shime) p.88; Re Galt Metal Industries Ltd., (1971), 23 L.A.C. 33 p. 37.

DECISION: 84-91

Halifax Industries Limited, Dartmouth Marine Slips AND Industrial Union of Marine and Shipbuilding Workers, Local 13

W. C. Kennettle, arbitrator

October 3, 1984

ISSUES: Proprietary Rights to Overtime Assignments 5:3220; Contracting Out: Assignment of Bargaining Unit Work to Non-Employees 5:1300; Overtime Work: Compensation 8:2130; Remedies 5:3240.

CIRCUMSTANCES: Six welders were sent home at the end of an afternoon shift and replaced by non-union contract employees for a single night shift on an emergency repair job. The company stated that the non-union workers were brought in so the regular union employees would be available for work the next day. The union argued that there were enough company welders available for the three shifts in question and that the non-union workers were not required for the job. The company conceded the point in an earlier stage of the grievance and states that a mistake was made. At issue in this case is the amount or type of compensation to be given the six grievors whose jobs were taken by the non-union workers. The union requested payment of overtime wages (four hours at time and one-half and three hours at double time). The employer wished to resolve the issue by providing a remedy in kind.

AWARD: Overtime wages as requested by the union were ordered to be paid. The remedy of payment in kind was deemed applicable only if the company had made a bona fide mistake. The judgement was that the contracting out was not a mistake.

DECISION: 84-92

Easco Electric Limited AND International Brotherhood of Electrical Workers, Local 625

R. Lorne MacDougall, Q.C., arbitrator

Ronald A. Pink, for the union
Eric B. Durnford, for the employer
October 3, 1984

ISSUES: Distribution of Work Within the Bargaining Unit 5:2000; Job Posting 6:2310.

CIRCUMSTANCES: The Collective Agreement specifies that the employer must maintain a "reasonable" ratio of first through fourth year apprentices. The union states that the employer violated the agreement by laying-off fourth, third and second year and no first year apprentices. The lay-off resulted in an imbalance in the ratios of the employees in the apprenticeship program. Four first year, two second year, one third and one fourth year apprentice remained. The company contends that the distribution of employees at various job sites required employees with different skill competencies and the imbalance was not intentional.

AWARD: The decision of the arbitrator supported the union's argument, that the imbalance in ratios of apprentices was immodest and excessive. The employer was directed to revise its policies in the future hiring, assignment and lay-off of apprentices to maintain the ideal of a numerically proportionate ratio in any given circumstance.

AUTHORITIES: Re Municipality of Metropolitan Toronto and Canadian Union of Public Employees, Local 43, (1983) 13 L.A.C. (3d) 58 (Mr. Treplitsky, Q.C.) p.61.

DECISION 84-93

Valley Health Services Association AND Nova Scotia Government Employees Union, Branch 52

S. Bruce Outhouse, Chairman

Ronald A. Pink and Elizabeth May, for the union
Cherry Ferguson, for the employer
June 8, 1984

ISSUE: Temporary, Casual and Part-time Employees 5:1124; Assignment of Bargaining Unit Work to Non-unit Employees 5:1400.

CIRCUMSTANCES: The employer hired five workers under a N.E.E.D. grant to upgrade the appearance of their building and operate a greenhouse as therapy for psychiatric patients. The union contends that the renovations completed by the N.E.E.D. workers was of a maintenance/repair nature covered by the Collective Agreement. The N.E.E.D. workers, except the greenhouse worker, performed the same tasks, were supervised by the same foreman as the regular union employees with whom they worked. The union asked that the N.E.E.D. employees be paid at the higher union scale wage in recognition of having worked within the bargaining unit classifications. The employer replied that the work did not fall within the bargaining unit classifications.

AWARD: The N.E.E.D. employees did do work as defined by the existing bargaining unit classifications and should have been paid at the higher rate. The greenhouse worker, however, was not included in the same classification and no additional pay was ordered.

AUTHORITIES: Re Social Planning Council of Metropolitan Toronto and Canadian Union of Public Employees, Local 1777 (1980), 28 L.A.C. (2d) 134; Brown and Beatty, Canadian Labour Arbitration (2d) p. 214-215; Palmer, Collective Agreement Arbitration in Canada (2d), p.437; Re Westroc Industries Limited and United Cement, Lime and Gypsum Workers, Local 366 (1973), 5 L.A.C. (2d) 16 (Beatty); Re United Steelworkers of America, Local 1817, and Fittings Limited (1960), 10 L.A.C. 294 (Little); Re United Steelworkers and Algoma Steel Corporation (1968), 19 L.A.C. 236 (Weiler).

DECISION: 84-94

Sydney Steel Corporation AND United Steelworkers of America, Local 1064

Judge J. A. MacLellan, arbitrator

Ben O'Neill, for the union
Gregory I. North, for the employer
July 4, 1984

ISSUES: Union Rights and Liabilities: Union Business on Company Time 9:1400; Discipline: Leave Work Without Permission 7:3130; Discipline: The Reasonableness of the Penalty 7:4300.

CIRCUMSTANCES: The grievor alleged that he was unjustly suspended for two days. He maintained that he had applied for and received permission from his foreman to attend a meeting on Union business as provided for in the Collective Agreement. Management argued that he had left work without permission and was disciplined accordingly.

AWARD: The Arbitrator found all the witnesses to be sincere. He concluded that there was an honest misunderstanding between the grievor and the foreman. Therefore the grievor was exonerated from doing wrong because of his reasonable belief that permission to leave work had been given. It was ordered that the grievor be reimbursed for lost wages and benefits as a result of the suspension and the suspension was to be removed from the grievor's record.

DECISION: 84-95

Construction Management Labour Bureau Representing Sutton Development Limited AND United Brotherhood of Carpenters and Joiners of America, Local 1392

N. M. Scaravelli, arbitrator

Ron Pink, for the union
June 15, 1984

ISSUES: Organization and Direction of the Work Place: Assignment of Bargaining Unit Work to Non-unit Employees 5:1400; Jurisdiction of the Arbitrator: Ordering Costs 2:1430, Damages 2:1410; Union Rights and Liabilities: Union Security 9:1200.

CIRCUMSTANCES: The union alleged breach of the Collective Agreement's Union Security Clause, presenting evidence that non-union carpenters had been used on a job for which the employer was subcontractor. At no time had these employees applied for union status as required by the Collective Agreement. This evidence was not contradicted.

The union requested compensation for fifteen weeks work and two months union dues. It also sought costs for legal counsel's fees and travel, as well as an order that the company be responsible for the arbitrator's one-third costs.

AWARD: The uncontradicted evidence of a breach of the Collective Agreement was accepted. However, the arbitrator found that the agreement was breached for twelve weeks only, awarding compensation accordingly. He declined to award costs, finding no authority to do so in the Collective Agreement. Nor did he order payment of the arbitrator's costs by the employer.

Included in the decision was correspondence between the arbitrator and the employer billing the latter for the costs of a hearing deferred at the employer's request because of lack of counsel.

AUTHORITIES: Re: Blouin Drywall Contractors Limited and United Brotherhood of Carpenters and Joiners of America, Local 2486 (1976) 57 D.L.R. (3d) 199 (Ont. C.A.); McDougall Construction Limited and United Brotherhood of Carpenters and Joiners of America, December 6, 1982 (unreported); Brown and Beatty: Canadian Labour Arbitration, p.61.

DECISION: 84-96

Kedy's Plumbing and Heating AND Halifax Local Union 56, United Association of Journeymen and Apprentices of the Plumbing, Steamfitting and Pipefitting Industry of the United States and Canada

R. Lorne MacDougall, Q.C., arbitrator

Ronald A. Pink, for the union
June 15, 1984

ISSUES: The Collective Agreement: Pension, Insurance and Welfare Plans 4:1400.

CIRCUMSTANCES: The union alleges that the employer had not made the contributions to the Health, Welfare and Pensions trust as provided for by the Collective Agreement. The only witness was an employee of the company administering the Trust Fund who testified as to the amount owed by the employer as well as to the fact that the employer acknowledged the debt, indicating an inability to pay. The employer was not represented at the hearing.

AWARD: There being no question that the employer had violated the Collective Agreement, the arbitrator ordered that the employer pay the said arrears forthwith into the Trust Fund.

DECISION: 84-97

Island Telephone Company Ltd. AND Telephone Plant Workers of Prince Edward Island, Local Union 1030, I.B.E.W.

Innis Christie, arbitrator

Paul J. D. Mullin, for the union
Linda St. Jean, for the employer
September 25, 1984

ISSUES: Compensation: Safety Equipment 8:4100; Interpretation of Collective Agreements: Management Rights 4:2310; The Collective Agreement: Company Rules 4:1500.

CIRCUMSTANCES: Under the Collective Agreement, the company and the union agreed "to provide safe working conditions, proper and adequate tools, equipment and protective devices". The union argued that this provision required the company to provide safety boots. Originally the company had

examined the issue and intended to provide each employee with one pair of safety shoes a year (prior to this, the company had contributed towards the purchase of safety shoes). Based on the experience of another company, it was decided not to provide shoes but to initiate a new policy of making a greater contribution to the cost of new safety shoes.

At issue was whether the safety boots were a protective device as considered by the Collective Agreement and, if so, whether the company had the obligation to provide the boots. The union wished redress for employees required to buy safety boots.

AWARD: The arbitrator found that, by the terms of the Agreement, the company had an obligation to provide the needed protective devices. Case law made it clear that safety boots were considered protective devices. However, it was the management prerogative of the company to set up a workable system of fulfilling this obligation. The arbitrator found that the compensation scheme did this, so did not order redress.

AUTHORITIES: Mueller, Ltd. (1964), 15 L.A.C. 208; Diebold of Canada Limited (1966), 16 L.A.C. 412; Delamere and Williams Co. Limited (1971), 23 L.A.C. 56; Hydro Electric Commission of the Township of Nepean (1972), 1 L.A.C. (2d) 264 (H. D. Brown, Chairman); Brown and Beatty: Canadian Labour Arbitration (2d), pp. 178-80

DECISION: 84-98

Island Telephone Company Ltd. AND Telephone Plant Workers of Prince Edward Island, Local Union 1030, I.B.E.W.

Innis, Christie, arbitrator

Paul J. D. Mullin, for the union
Linda St. Jean, for the company
October 2, 1984

ISSUES: Interpretation of Collective Agreements: Management Rights 4:2310;
The Collective Agreement: Company Rules 4:1500.

CIRCUMSTANCES: The Collective Agreement provided that employees working temporarily away from their normal headquarters over a meal period should receive a meal at the company's expense. The way in which the company fulfilled this agreement had varied over the years, evolving into a circular stating a company policy imposing an upper limit on the amount that an employee would be reimbursed for lunch. The union argued that a "contribution" to an employee's lunch did not reasonably meet the term of the Collective Agreement and presented evidence that meals were, on the average more expensive, including tax and gratuity, than allowed for. The company argued that the limit was determined based on the average amount on vouchers submitted in the past, on a survey of the allowances of other companies and on a negotiated agreement.

AWARD: The arbitrator reminded the parties of his limitations under the Collective Agreement since he could not substitute terms of the Collective Agreement. He reiterated the management prerogative to establish a workable system and the ultimate solution of the grievance and arbitration process to determine reasonableness. However, he found the amount stated in the circular was not fair and reasonable in light of the costs of lunches.

AUTHORITIES: British Columbia Telephone Co. (1977), 17 L.A.C. (2d) 211 (Slutsky, Chairman); Brown and Beatty: Canadian Labour Arbitration (2d), pp. 178-80; Telephone Plant Workers of Prince Edward Island, Local 1030, I.B.E.W., and Island Telephone Company Ltd., unreported September 25, 1984 (Christie).

DECISION 84-99 (Preliminary Award)

The Town of New Glasgow AND The New Glasgow Police Association, Local 103 of the Police Association of Nova Scotia

Innis Christie, Chairman; Charles A. MacDougall, Matthew J. McPherson

Bruce Evans, for the union
Bruce T. MacIntosh, for the employer
October 16, 1984

ISSUES: Res Judicata: Decisions of Other Boards of Arbitration 2:3220; Time Limits: Mandatory or Directory 2:3128.

CIRCUMSTANCES: The grievor was removed from the position of acting second in command of a platoon. He grieved this removal. The Board found the grievor had occupied the position and was improperly removed from it and therefore ordered the employer to comply with the Collective Agreement and permit the grievor to have grievance heard (Decision 83-01). On application to the Provincial Supreme Court the disciplinary decision was quashed but review of the arbitration award was refused.

The grievor then initiated this grievance claiming benefits equal to what he would have received as acting second in command plus interest. The employer argues res judicata and lack of timeliness. The union argues the issue is not the same and the time limits were adhered to. The Board agreed to hear these preliminary objections before hearing the merits.

AWARD: The preliminary objections are not accepted. Res judicata does not apply because the issue is not the same as the previous grievance. The first grievance dealt with whether the position of second in command existed and if the grievor had been removed illegally. The Supreme Court decision changed the situation by establishing that the grievor was still legally acting second in command.

The timeliness objection is rejected because there is no factual basis to determine that the relevant time limits were not complied with as the incident giving rise to this event was the failure of the employer to respond to Supreme Court decision. The lack of specification of consequences of failure to obey time limits also leads to the conclusion that they are directory rather than mandatory limits.

DISSENT: This grievance is essentially identical to the first agreement as it involved the same situation and is brought for the same reason. Res judicata should therefore apply.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration (2n ed.) para. 2:3220; Re Manitoba Food and Commercial Workers Union, Local 832 and Canada Safeway Ltd., (1981) 123 D.L.R. (3d) 512 SCC.

DECISION: 84-100

Maple Hill Manor AND Maple Hill Manor Local of The Nova Scotia Nurses' Union

Elwin J. MacNeil, Chairman; Frank L. Elman, Q.C.; Raymond F. Larkin

David Reynolds, for the union
A. Robert Sampson, for the employer
October 12, 1984

ISSUES: Lay-Off Defined 6:2200; Reduction of Hours 6:2210; Interpretation, Words and Phrases, Lay-Off 6:2200, 6:2210.

CIRCUMSTANCES: The grievor, a regular part-time nurse, had her hours reduced by half though she works the same number of shifts. The union argues this violates the Collective Agreement provision that maintains the number of nurses and shifts unless "financially impossible" to do so. The employer argues it is entitled to reduce hours due to severe financial pressure.

AWARD: The grievance succeeds. The very strong language of the Collective Agreement imposes a strong onus on the employer to justify the reduction. There is no dispute that the reduction is a lay-off. While the employer acted pursuant to outside professional advice on decreasing the costs of nurses' wages it did not demonstrate to the Board the cost saving measures in other areas could not be made to give the necessary cost savings without lay-offs. As such the employer did not demonstrate it was "financially impossible" to maintain the grievor's hours. Compensation is ordered for the hours lost until this decision is implemented.

DECISION: 84-101

Standard Paving Maritime Limited AND International Union of Operating Engineers, Local 721

Judge J. A. MacLellan, arbitrator

Edgar Doull, for the union
R. F. Titus, for the employer
October 19, 1984

ISSUES: Disciplinary Penalties: Types of Penalties, Monetary, Penalties, Fines 7:4220, 8:1420; Management Rights, Fairness 4:2300, 4:2320.

CIRCUMSTANCES: The grievor was involved in an accident involving one of the employer's vehicles. The employer deducted money from the grievor's salary to pay for one-half the damage done to the other vehicle. The union argues the employer has no authority to make these deductions in the absence of consent of the grievor. The employer argues that the grievor's signature on an agreement to abide by the employer's safety policy entitles them to make the deductions. The policy stated dismissal may result from breach but does not mention payroll deductions to cover damage.

AWARD: The grievance succeeds. The grievor's uncontested testimony shows he was not at fault. The employer's action, while motivated by the legitimate need to reduce accidents, was unfair because it did not give the grievor an opportunity to give his side of the story. As such all monies deducted are to be returned and no more are to be deducted.

DECISION: 84-102

The Inverness County Municipal Housing Corporation AND Canadian Union of Public Employees, Local 2031

Bruce Outhouse, arbitrator

Linda Gallant, for the union
Harold MacIsaac, for the employer
October 23, 1984

ISSUES: Interpretation: Aids to Interpretation, Past Practice 2:2220; Ambiguity 2:2220; Arbitrability: Matters Arising Outside of Agreement 2:1210; Insurance and Welfare Plans: Calculation of Benefits 8:3300.

CIRCUMSTANCES: The Collective Agreement provided for cumulation of sick leave for which the employee would receive payment on ceasing employment. The union argues the Collective Agreement is clear and that payment can only refer to the use of current wage rate in determining the amount due. In the alternative the union argues past practice. The employer argues the matter is unarbitrable because the provisions are silent as to method of payment.

AWARD: The grievance succeeds. The union's position is consistent with the usage of the term "payment" in other parts of the Collective Agreement. As a general term "payment" is legitimately the subject of interpretation, which is a different situation from the Collective Agreement being silent. The evidence of past practice also compels this conclusion. For eight years the entitlement was calculated at the wage rate existing at the cessation of employment, not the wage rate under which the sick leave was accumulated.

The employer is directed to compensate the grievors for the difference between the amounts previously paid to them and the amounts which should have been paid based on the wage rates in effect at the time of their respective retirements.

AUTHORITIES: Hawker-Siddeley Canada Inc., Trenton Works Division vs. United Steelworkers of America, Local 1231, (1983) 59 N.S.R. (2d) 29; Brown & Beatty, Canadian Labour Arbitration (2n ed.) p. 51-52.

DECISION: 84-103

MacGregor Bedding Inc. AND United Steelworkers of America, Local 8176

Judge J. A. MacLellan, Arbitrator

Raymond Larkin, for the union
Richard S. Goodman, for the employer
October 26, 1984

ISSUE: The Object of Construction: The Intention of the Parties 4:2100; Holiday Pay 8:3100; Payment for Holidays Falling on Non-Working Days 8:3110; Qualifying for Holiday Pay: Qualifying Days 8:3120; Absence Caused by Layoff 8:3122.

CIRCUMSTANCES: The union filed grievances on behalf of five employees who did not receive holiday pay for Good Friday and Easter Monday. These employees were on layoff on the working day immediately preceding or succeeding the holiday, but were available for additional work, if called. The union argues that the grievors were absent due to company layoff, over which they had no control. Further, the union argues that one must give effect to the basic objective of the collective agreement to discourage absenteeism. The employer argues that by following a literal interpretation of one section of the collective agreement, the grievors are not entitled to holiday pay because they did not work the required preceding and succeeding days. In addition, the company argues an employee must be scheduled for work in order to be absent from work.

AWARD: The grievance fails. Two sections of the collective agreement apply to this case. The second of these sections clarified the apparent ambiguities in the first, which formed the basis of the grievor's claim to entitlement to holiday pay.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration, (2nd ed), 1984, p. 576, para. 8:3122.

DECISION: 84-104

Allen's Dairy Ltd. AND Retail, Wholesale and Department Store Union, Local 1015.

R. Lorne MacDougall, Q.C., Arbitrator

Kenneth Hennick, for the union
James C. Leffe, Q.C., for the employer
October 24, 1984

ISSUE: The Collective Agreement 2:1200; Real and Documentary Evidence 3:3100; Retroactivity 4:1610; Temporary, Casual and Part-time Employees 5:1124; Voluntary or Compulsory 5:3210; Overtime 5:3200; Discipline and Discharge - Just Cause 7:1200.

CIRCUMSTANCES: The grievor, a casual employee, alleges that he was laid off without notification, and not rehired. He argues that this is in violation of the new collective agreement which was negotiated during his time of employment and membership in the union. The employer maintains the grievor was not recalled because he worked overtime without permission, and therefore was the type of employee who needed constant supervision. The grievor indicated he had permission to work, and this was corroborated by the shop steward who was the grievor's co-worker during the overtime period. The grievor's ability and willingness to work have been corroborated by other personnel as well.

AWARD: The grievance succeeds, and the employer's arguments are rejected. The grievor was found to have had permission to work, as substantiated by other employees as well as by the circumstances in the work place. The arbitrator retains jurisdiction for compensation if satisfactory arrangements cannot be made.

DECISION 84-105

Board of Directors of Maple Hill Manor AND The Maple Hill Manor Local of the Nova Scotia Nurses Union

Judge F. B. William Kelly, Q.C., Chairman; Frank Elman, Q.C., Raymond Larkin

David Reynolds, for the union
Robert Sampson, David Delaney, for the employer
October 31, 1984

ISSUE: Dictionaries 4:2210; The Object of Construction: The Intention of the Parties 4:2100; Temporary, Casual and Part-time Employees 5:1124; Performing Work on a Statutory Holiday 8:3130.

CIRCUMSTANCES: Shortly after the implementation of a first collective agreement, work scheduling difficulties arose. The union filed a grievance on behalf of three regular part-time nurses who were scheduled and then re-scheduled for holiday duty. When the grievors agreed to the rescheduled

work assignments, they were then paid at a lower rate applicable to relief nurses. Clarification is sought concerning their status within the bargaining unit, as well as their correct rate of pay for holiday time.

AWARD: The grievance succeeds. The interpretation of the intent of the collective agreement is to create two distinct categories - relief nurses and regular part-time nurses. Both of the groups are viewed as "vacant shift nurses", but the regular part-time nurses are held to be within the bargaining unit and so are entitled to special (holiday) pay benefits. Jurisdiction is retained if compensation cannot be agreed upon.

DISSENT: Elman stated the regular part-time nurses are defined as relief nurses if they have placed their names on the list indicating willingness to work extra shifts. Any other interpretation of this ambiguity would produce absurd results.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration, (2nd ed.), 1984, para. 4:2110, 4:2210; Black's Law Dictionary; Re: Peter Austin Manufacturing, 24 L.A.C., (2d) p. 289.

DECISION: 84-106

The City of Sydney (N.S.) AND Canadian Union of Public Employees, Local 933.

N. M. Scaravelli, Chairman; Everett C. Baker, D. MacKay

Gerald Yetman, for the union
M. G. Wholley, for the employer
October 30, 1984

ISSUE: Past Practice 3:4430; Skill and Ability Requirement 6:3300;
Examination and Tests 6:3340.

CIRCUMSTANCES: A grievance was filed by the union to determine whether the employer may use a test to evaluate the suitability of candidates for internal appointments. While the employer maintains the right to assess a candidate's ability under the terms of the collective agreement, the grievor contended that a test had never been used for such purposes. Further, the grievor held that seniority was the main factor in such cases and that a probationary period was the usual means for evaluating job suitability.

AWARD: The grievance fails. The employer's right to assess ability through means of a test is found to be consistent with provisions of the collective agreement despite the lack of precedent for the use of such means.

DISSENT: Baker stated that changes in procedures should be made known before their implementation and specific steps taken to insure that the test be seen to be fair and objective and to be administered in a fair and objective manner.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration, (2nd ed.), 1984, p. 298; Corporation of City of Stratford v. Stratford Firefighters Association, 25 L.A.C., (2d), 1980, p. 177; Inglis Ltd. v. United Steelworkers, 22 L.A.C. (2d), 1980, p. 175.

DECISION: 84-107

Hawker-Siddeley Canada, Inc. AND United Steelworkers of America, Local 1231.

Eric G. DeMont, Q.C., Arbitrator

Edward Levert, for the union
John M. Howatson, for the employer
October 30, 1984

ISSUE: The Basic Principle: Relevance 3:4200; Layoff 6:2200; Bumping 6:2330; Rights of Recall 6:2354; The Skill and Ability Requirement 6:3000; The Scope of Arbitral Review 6:3100; Proof of Ability 6:3200; Senior Employee with Required Ability 6:3210; Trial, Training and Familiarization Periods 6:3230; Ability and Qualifications Criteria 6:3300; Examination and Tests 6:3340; Safety: Inability to Perform Job 7:3220.

CIRCUMSTANCES: The grievor, a laid-off "hook-on", applied for a "bump slip" to return to the shop as a crane operator. The collective agreement allowed him to do this on the basis of his seniority; he had also been trained previously in crane operation. The company evaluated his abilities as a crane operator and found them inadequate in relation to present production requirements.

AWARD: The grievance fails. The employer's concerns about the grievor's present ability to perform safely in the work area were recognized. The employer's decision was seen to be fair and without bias.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration, (2nd ed.), p. 298-299, 302-304, 305.

DECISION: 84-108

Metropolitan Authority of Halifax, Dartmouth and the Municipality of the County of Halifax AND The Halifax Civic Workers Union

R. Lorne MacDougall, Q.C., Arbitrator

Bruce Evans, for the union
Terry Roane, for the employer
November 2, 1984

ISSUE: Discipline: Warnings, Suspensions, Discharge 7:3542, Insufficient and/or Careless Work 7:3520, Doctrine of the Culminating Incident-Use of the Prior Record 7:4314.

CIRCUMSTANCES: The grievor alleged that the employer violated the collective agreement by suspending him for three days without cause.

The grievor was employed as a tractor-trailer driver hauling garbage from the transfer station to the landfill site. He was suspended following a complaint about his driving from a member of the public who alleged he was driving over the speed limit and almost caused an accident by cutting in too close on the complainant when changing lanes. In deciding on the discipline, management took into consideration the grievor's past record which included backing into a car, making a U-turn in a road, thereby causing an accident, and backing into a garage door. Management also believed the grievor was speeding because his gas mileage was consistently lower than that of the other drivers.

The grievor defended his actions by saying that his truck was incapable of going as fast as alleged and that his fuel mileage was the result of a faulty fuel pump. He admitted to going too fast to avoid rear-ending a dump truck braking in front of him at the time of the incident in question, which necessitated changing lanes to avoid an accident.

AWARD: The grievance fails. The grievor admitted being careless or negligent in allowing his vehicle to get too close to the dump truck in front, requiring the lane change leading to the complaint. The arbitrator was unable to say that the penalty imposed was unjust given the circumstances and the grievor's record.

AUTHORITIES: Re U.S.W. and International Nickel Co. of Canada Ltd., (1968), 19 L.A.C., 118.

DECISION: 84-109

Management Committee of East Cumberland Lodge AND Canadian Union of Public Employees, Local 2391

Judge J. A. MacLellan, Chairman; Jack Ingram; Charles Weir

A. K. Cunningham, for the union
Kevin MacNamara, for the employer
November 14, 1984

ISSUE: Discipline: Disciplinary Penalties 7:4000, Insufficient and or Carelessness Work 7:3520; Warnings, Suspensions, Discharge 7:3542;
Jurisdiction of the Arbitrator: Reinstatement and Substitution of Penalty 2:1470.

CIRCUMSTANCES: One grievor requested that a letter of discipline be removed from her file and the other grievor requested compensation for an unjust suspension. The disciplinary measures were both imposed following an incident in which a resident injured his hand. One grievor of the nursing home was cited for causing the incident and both were disciplined for failing to report the accident immediately. Management relied on the

testimony of the injured resident, who had died before the grievance was heard. The grievors both maintained that the patient had probably injured his hand from thrashing on the bed, and that the R.N. on duty had been summoned as soon as the injury was noticed.

AWARD: The grievance succeeds. Although the Board found that management acted in a reasonable manner, the evidence at the hearing clearly indicated that the grievors were not responsible for the accident which they reported immediately and therefore were absolved from any blame. The letters written were ordered removed from the personnel files and it was ordered that the one grievor was to be reimbursed for any lost wages and benefits.

DECISION: 84-110

Bic Enterprises Limited AND Labourers' International Union of North America, Local 615

Bruce Outhouse, Arbitrator

Ronald Pink and Gordon Forsythe, for the union
Deborah Carver, for the employer
November 12, 1984

ISSUE: Organization and Direction of the Work Place: Assignment of Bargaining Unit Work to Non-Unit Employees 5:1400, Remedies for Improper Work Assignment 5:1500; Jurisdiction of the Arbitrator: Damages 2:1410.

CIRCUMSTANCES: The employer was a unionized contractor subject to the provisions of the collective agreement between the union and the Construction Association Management Labour Bureau. The union alleged that the employer breached the security provisions of that collective agreement by failing to hire unionized labourers of its own, even though it had done work within union jurisdiction and had also failed to ensure that its subcontractor hired unionized labourers to do labourers' work. Evidence in support of this was presented based on three major contracts by the employers during the calendar year. The union claimed \$143,456.40 in damages for lost wages.

The employer, a small company which subcontracted most of its work, denied any breach of the agreement. It argued two distinct liability issues - one, that the union did not meet the burden of proving the employer's own employees performed labourers' work and two, that the Articles in issue did not apply to all subcontract work but only such work as was previously carried out by the employer's own employees. Further, to interpret the articles broadly, would effectively put the employer out of business, because having to pay union wages would not enable it to competitively bid on contracts. Not getting the contracts would mean that union labourers would not have work anyway.

Alternatively, if the employer was to be found in breach of the agreement, it argued that the arbitrator not award the damages sought. It argued that the agreement provided that damages could be awarded with respect only to the seven days preceding filing the grievance and subsequently. (All three contracts at issue were in place prior to that). It also argued estoppel since the union had never before grieved the employer's continuing hiring practices. Third, it argued that there was insufficient evidence to permit proper assessment of damages.

AWARD: The grievance succeeds. The articles in question were not to be given a restrictive interpretation. They complemented the preferential hiring scheme which is a common, indispensable fact of the construction industry. Because there is no continuity of employment in the construction industry, the enforcement of such schemes is of paramount concern to the craft union. The arbitrator did not accept the arguments of a time-barred claim, of estoppel or contingencies.

The arbitrator retained jurisdiction in assessing damages but suggested the parties attempt to reach agreement. He suggested the union's estimate was too high since the evidence presented was only a quesstimate. Such a large amount would have a detrimental effect on the economics of such a small firm and more precise information for computing the amount of lost wages was available as a result of the grievance hearing.

AUTHORITIES: Re Blouin Drywall Contractors Limited and United Brotherhood of Carpenters & Joiners of America, Local 2486, (1975), 57 D.L.R. (3d) 199 (Ont. C.A.); Re Burrard Yarrows Corporation, Vancouver Division and International Brotherhood of Painters, Local 138 (1981), 30 L.A.C. (2d) 331 (Christie); Re McDougall Construction Limited and United Brotherhood of Carpenters & Joiners of America, Local 1392 (December 6, 1982), unreported (Kelly); Re Mersey Electrical & Contracting Limited and International Brotherhood of Electrical Workers, Local 625 (May 15, 1984), unreported (Demont); Palmer, Collective Agreement Arbitration in Canada, Second Edition, pp. 457, 458, 128; Re United Brewery Workers, Local 371 and Brewer's Warehousing Company Limited (1964), 15 L.A.C. 155 (Egan); Re Millwright & Machine Erectors, Local Union 1178 and Construction Association Management Labour Bureau Limited (January 12, 1983), unreported (Outhouse).

DECISION: 84-111

Saint Mary's University AND Saint Mary's University Faculty Union

Bruce Outhouse, Chairman; Brian Crocker; Jon Thompson

Howard Snow, for the union

Eric Durnford and Peter MacLellan, for the employer

October 26, 1984

ISSUE: Discipline: Deviant Behaviour 7:3400, Reasonableness of the Penalty 7:4300; Jurisdiction of the Arbitrator: Reinstatement and Substitution of Penalty 2:1470; The Arbitration Process: Weighing the Evidence 3:5100; Sexual Harassment 7:3430.

CIRCUMSTANCES: The employer dismissed the grievor for "unsatisfactory" treatment of students and staff and sexual harassment following an investigation of several months by the Academic Vice-President upon initiation by the department in which the grievor taught. At issue was whether the employer had just and proper cause for doing so. The Board detailed at length the discrepancies in the evidence of the grievor and witnesses called.

AWARD: The grievance succeeds. The Board expressed reservation that over a year elapsed between the incidents in question and disciplinary procedures; that the misconduct was serious enough to justify dismissal; and that in balancing interest, upholding the discharge would have disastrous consequences for the grievor's career. However, there were grounds for discipline and the Board assumed authority to substitute the penalty of suspension without pay for one month. A copy of the decision, to be considered a formal complaint, was to be placed in the grievor's personnel file.

DISSENT: Mr. Crocker agreed with the majority that there was not just and proper cause for dismissal. However, he felt that the penalty imposed should be three months without pay. Mr. Crocker found the incidents involving students to be sexual harassment meriting stern discipline.

AUTHORITIES: Canadian Association of University Teachers Guidelines on Professional Ethics and Professional Relationships "Abuse of Professional Authority: Sexual Harassment"; Re CUPE and Professional Employees International Union, Local 491 (1982), 4 L.A.C. (3d) 385; Glouvanoudious v. Golden Fleece Restaurant et al (1984), 5 CHRR, Decision 348; Potapczyk v. MacBain (1984), (Human Rights Tribunal under the Canadian Human Rights Act - not reported).

DECISION: 84-112

Metropolitan Authority of Halifax, Dartmouth and Halifax County AND
Correction Officers Association of Nova Scotia

Innis Christie, Arbitrator

Raymond Larkin and Richard Bureau, for the union
Terry Roane and A. William Cox, Q.C., for the employer
November 8, 1984

ISSUE: Organization and Direction of the Work Place: Temporary, Casual and Part-time Employees 5:1124, Defining the Bargaining Unit 5:1100; The Arbitration Process: Admissibility of Evidence - Past Practice 3:4430; The Collective Agreement: Interpretation of Collective Agreements - Object of Construction: Intention of the Parties 4:2100.

CIRCUMSTANCES: The union grieved that two female relief correction officers had not had union dues deducted. The relief officers were called into work when full-time staff were not available. The union argued that the collective agreement referred unambiguously to a bargaining unit "of all employees... employed at the Correction Centre", thus including the relief workers.

Counsel for the employer presented evidence of past practice subject to the union's objection that collective agreements with another union was not relevant. In the past, part-time employees were not included in the bargaining unit. The employer also argued that according to the practice of the Labour Relations Board at the time of certification relief workers were not part-time employees (and thus included in the unit) because they work only when others cannot and have an option to accept the work or not.

AWARD: The grievance fails. The arbitrator based his decision on the definitions of the bargaining unit in the collective agreement. It was his conclusion that none of the definitions included the relief workers.

AUTHORITIES: Sault Ste. Marie Board of Education (1974), 5 L.A.C. (2d) 179 (Shine, Chairman); Leamington and District Memorial Hospital (1976), 13 L.A.C. (2d) 219 (Weatherill).

DECISION: 84-113

Nova Scotia Liquor Commission AND The Association of Commercial and Technical Employees, Local 1670

R. Lorne MacDougall, Q.C., Arbitrator

Blaise MacDonald, for the union
James C. Leefe, for the employer
November 13, 1984

ISSUE: Discipline and Discharge: Burden of Proof 7:2300, Company Rules 4:1500, Grounds for-Carelessness 7:3520, Theft 7:3310, 7:3312, 7:3314; Disciplinary Penalties: Mitigating Factors 7:4400, Work Record 7:4428, Demotion or Transfer 7:3520, 7:3544.

CIRCUMSTANCES: The grievor has worked for the employer for the last 22 1/2 years with a good record and no question of his honesty. He has been an Assistant Manager since 1976. An extensive investigation revealed unaccounted for cash shortages in the last two stores the grievor has worked. The Manager at his last store has been disciplined for, among other things, taking some of the money in question. Extensive evidence was presented on the accounting procedures in place at the time of these incidents. Some entries had been deliberately changed.

The grievor received a one week suspension and a demotion to clerk as a result of these happenings. The employer argues this was justified as the grievor had at least demonstrated negligence and incompetence in handling cash and that there is a probability he took at least some of the money. His present position removes him from handling cash. The union agrees the penalty would be justified if theft was established but denies this has been established.

AWARD: The grievance succeeds. The employer must prove its allegations according to the balance of probabilities standard. Accounting procedures at the relevant times were flawed, though new procedures have corrected the problem. Given the conduct of his last manager and the way the store operated the burden has not been discharged concerning incidents at that store. Given the grievor's conduct throughout the investigation, his denials, and his apparent history of honesty this burden has not been discharged for the remaining incidents.

The grievor did disregard company rules and made entries without proper checks allowing cash to be stolen while he was in charge. While technically he was disciplined for these violations it is evident the employer's main motivation was a belief in the grievor's guilt. Given the grievor's past record, the substituted penalty is a temporary demotion ending November 30, 1984 with no compensation for the suspension.

AUTHORITIES: Re Nova Scotia Liquor Commission and Nova Scotia Liquor Commission Employees Union, Local 470, C.L.C. (1974), 5 L.A.C. (2d), 117 (Richard); Palmer, Collective Agreement Arbitration in Canada.

DECISION: 84-114

Ben's Limited AND Bakery, Confectionary and Tobacco Workers International Union, Local 446

Judge J. A. MacLellan

Rene Quigley, for the union
Glen V. Dexter, for the employer
November 20, 1984

ISSUE: Promotion, Demotion and Transfer: Promotion Defined 6:2100; Seniority 6:2000; Skill and Ability: Criteria of Ability and Qualifications 6:3300.

CIRCUMSTANCES: The grievor was unsuccessful in a competition for another position within the company. The successful candidate had approximately one-half the seniority, less formal education and no upgrading course. The employer regarded both the grievor and the successful candidate as well qualified for the position but decided against the grievor because she had a higher rate of absenteeism and tended to become disinterested in a position after working in it a while.

AWARD: The grievance succeeds. The collective agreement provision covering promotions and demotions does not apply because this was a transfer. Both positions had the same rate of pay, classification, opportunity for advancement and opportunity for increased pay.

The employer accepts it is bound for these purposes by a letter to employees promising to give significant consideration to seniority in transfers. The employer's decision does not have the appearance of being fair. The grievor's absences due to illness were never subject to a complaint in violation of policy or taken in questionable circumstances. The employer never discussed the alleged attitude problem with the grievor. Given that both were qualified the employer cannot be said to have given significant consideration to seniority in light of the grievor's much longer time with the company. The grievor is therefore entitled to the position.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration (2d) at 271-273; Re Ascolectric Ltd. and International Union of Electrical, Radio and Machine Workers, Local 470, (1983), L.A.C. (3d), 438 (MacDougall).

DECISION: 84-115

City of Dartmouth AND Dartmouth Police Association, Local 101 of the Police Association of Nova Scotia

Innis Christie, Chairman; Gregory I. North, Charles A. MacDougall

Bruce Evans, for the union
Michael Moreash, for the employer
November 13, 1984

ISSUE: Management Rights, Classification 5:2200; Evidence, Types of, Extrinsic 3:4400; Past Practice 3:4430.

CIRCUMSTANCES: The collective agreement specifies there is to be a two man canine section but does not include job descriptions. Due to the expense the employer did not fill a vacancy in the section until a grievance was pressed. The employer filled the position and paid the constable the special rate but did not provide any training equipment or a dog. The union grieves this arguing past practice ought to be used to resolve the latent ambiguity in the classification. The employer argues it has fulfilled all obligations under the agreement.

AWARD: The grievance fails. The latent/patent distinction is not important here. Even if evidence of past practice was considered it would not assist the union because that practice must follow from a sense of obligation. Here there is evidence that the past practice represents a prior chief's personal desire to have two fully equipped dog masters while other members of management felt they were not obligated to provide them. In the absence of specific restraints management may classify jobs as it wishes. As there is no specific mention of equipment and training in the collective agreement the grievance fails.

AUTHORITIES: John Bertram and Sons Co. Ltd. (1967), 18 L.A.C., 362 (Weiler); Brown and Beatty, Canadian Labour Arbitration, (2nd ed.), p. 367-368, Algoma Steel Corporation (1968), 19 L.A.C., 236 (Weiler), Windsor Public Utilities Commission, (1974), 7 L.A.C., (2d) 380.

DECISION: 84-116

The Metropolitan Authority of Halifax, Dartmouth and the Municipality of the County of Halifax AND Halifax Civic Workers' Union, Local 108

R. Lorne MacDougall, Q.C., Arbitrator

Bruce Evans, for the union
A. W. Cox, Q.C., for the employer
November 22, 1984

ISSUE: Overtime: Compulsory 7:3634, Refusal to Work 7:3634, 7:3636;
Discipline and Discharge: Insubordination, Refusal to Obey Instructions 7:3634, Disciplinary Penalties 7:4200.

CIRCUMSTANCES: The grievor worked at the employer's landfill site covering garbage with a layer of earth. For environmental reasons and due to complaints by area residents it was important that the garbage be covered each day. This was emphasized as a result of a complaint on coverage on June 9. The grievor's job description required him to complete coverage before leaving. The employer had the right to compel fifteen hours of overtime. The grievor made the employer aware on June 13 he would not work more overtime for that period. He received a one day suspension for not completing coverage on June 14. He received a three day suspension for not completing coverage on July 26 and for being insubordinate. He had not completed his compulsory overtime. He grieves the suspensions.

AWARD: The grievance succeeds. As to the first suspension the grievor was within his rights and had given prior notice that his old habit of exceeding the required overtime hours was at an end. He is entitled to full pay for the day.

As to the second incident the employer was justified in disciplining the grievor for his failure to comply with the well known policy of working overtime to finish the job without specific orders, as he had not yet exceeded the fifteen hour limit. The penalty is decreased because the employer treated this as a second offense (not a first) and because the employer thought the grievor was insubordinate to his supervisor, a finding his supervisor did not support. As such the suspension is decreased to two days, the grievor is entitled to the additional day's pay.

DECISION: 84-117

Camp Hill Hospital AND Public Service Alliance of Canada

Elwin J. MacNeil, Chairman; Donald H. McDougall, Q.C.; David P. Reynolds

Derek Dagger, for the union

Brian Johnston, for the employer

November 21, 1984

ISSUE: Insurance and Welfare Plans: Entitlement to Benefits 8:3320; Interpretation 4:2100, Reasonableness 8:3342, Pregnancy, Medical Benefits 8:3320.

CIRCUMSTANCES: The grievor was placed on unpaid maternity leave by the employer. Her application for sick leave was rejected. An earlier application for sick leave had likewise been rejected. The grievor had had two previous miscarriages, required hospitalization earlier in this pregnancy, and was under a great deal of stress. The facts were not in dispute.

AWARD: The collective agreement clearly gave the employer the right to place an employee on maternity leave when she was unable to perform her duties (Article 17.04(2)). A pregnant employee can be placed on sick leave for illness arising out of pregnancy (Article 17.04(6)) but must satisfy the employer that she cannot perform her duties by reason of the illness (Article 18.02).

Pregnancy is not to be considered an illness. While the grievor must satisfy the employer of the facts, the grievor's past history and current medical problems clearly elevate this case above a normal pregnancy. The employer must act reasonably and objectively in satisfying itself. It did not do so here in adhering to a position that all that was wrong with the grievor was the fact of pregnancy.

The grievance succeeds. Compensation is left to agreement of the parties. If there is no agreement the board will decide.

DISSENT BY MCDOUGALL: Pregnancy is not an illness. The drafting of Article 17.04 (1) is very particular, giving the employer a general right to place an individual on maternity leave where a pregnant woman could not perform her job duties, as well as a right to do so where her work is materially affected by the pregnancy, even though the duties called for by the position would not normally be affected by a pregnancy.

The grievor must satisfy the employer that she cannot perform her duties because of illness, not pregnancy, to obtain sick leave. The term "satisfaction" bestows very weak discretion. The majority are merely substituting their own opinion for that of the employer, clearly not what the language contemplates. In the absence of evidence of bad faith or no rational basis for the decision the employer's decision must stand to give effect to the language of the collective agreement.

AUTHORITIES: Halifax Infirmary Nurses' v. Halifax Infirmary (1981), 49 N.S.R. (2d) 98 (N.S.S.C.); Re Hayward (1934), L.R. (2d) 210 (O.S.C.); Teur v. London Life Insurance Company, (1935), 3 W.W.R., 368 (Man. C.A.); S. A. deSmith, Judicial Review of Administrative Action, (1959) p. 243; S. A. deSmith, Judicial Review of Administrative Action, (4d), p. 291-292; Labour Standards Code, s.56 (1).

DECISION: 84-118

Antigonish District School Board AND Canadian Union of Public Employees Union, Local 1524

Judge J. A. MacLellan, Arbitrator

Ronald W. Blunden, for the union
A. G. MacDonald, for the employer
December 3, 1984

ISSUE: Job Posting: Posting Procedure 5:2520; Skill and Ability: Criteria of Ability and Qualification 6:3300; Work Assignment: Contracting Out 5:1300.

CIRCUMSTANCES: The grievor, a long time employee, was unsuccessful in a competition for a transfer. The successful applicant was a non-union person. The job posting did not comply with provisions in the collective agreement. This defect failed to bring the attention of the grievor to the new job description. The grievor had relied on the employer being aware of his past experience and so did not place much detail on his application or ask many questions in the interview.

AWARD: The grievance succeeds. An inadequate notice could well have affected the way the grievor completed his application form and behaved in the interview. This is no indication of discrimination. If the grievor requests within two weeks, the employer is to re-interview the grievor and the successful applicant. The employer shall then decide between the two based on the new interview without regard to the successful applicant's experience obtained since he started in his present position.

DECISION: 84-119

Nova Scotia Liquor Commission AND Nova Scotia Liquor Commission Employees, Local 470

Judge J. A. MacLellan, Arbitrator

Ronald Pink, for the union
Jame C. Leefe, Q.C., for the employer
December 3, 1984

ISSUE: Insurance and Welfare Plans: Entitlement to Benefits 8:3320.

CIRCUMSTANCES: The grievor phoned the employer to notify that he would not be in that day but did not specify the reason. The next day he reported to his new position in another store. The grievor was suspected of sick leave abuse and was requested to fill out a medical form for each sick leave taken. As a result of his transfer the grievor did not receive the form and was therefore denied benefits despite his claim that he was sick. The employer argues that the grievor had the duty to get the form and that he was required to specify he was sick at the time of taking sick leave. The grievor maintains he was sick and is the victim of an administrative error.

AWARD: The grievance succeeds. The grievor ought not be penalized for a poor choice of words. The employer could have requested more information. There is nothing to contradict the grievor's claim of illness. As such the employer must pay the grievor for the day's pay he was docked.

DECISION: 84-120

Dartmouth General Hospital and Community Health Centre AND Nova Scotia Nurses' Union

Peter E. Darby, Chairman; Raymond F. Larkin, Donald H. McDougall

David Reynolds, for the union
Eric Durnford, for the employer

ISSUE: Management Rights: Company Rules 4:1500; Reasonableness: Company Rules 4:1500.

CIRCUMSTANCES: This is a combined personal and policy grievance. The employer requires a medical certificate to be filed on the first day back to work after illness if the employee has been advised that she is suspected of abusing sick leave or that she has used it more than a specified amount.

The union argues this is an unjust form of discipline as a letter is included in the employee's file which is unclear as to whether the individual is a suspected abuser. It also argues that it contravenes the collective agreement by requiring the employee to pay the cost of the medical exam. Finally it is argued that the rule is unreasonable as it applies in all cases, even where no dispute over the illness exists and requires a blanket consent to the release of information.

The employer denies it is a form of discipline and has made it clear the letter in the personal file will not be used for that purpose unless a notation is made that the employee is a suspected abuser. The employer argues it is within its rights to make this rule and is not subject to a requirement of reasonableness.

AWARD: The personal grievance is dismissed. The undertaking by the hospital clears up any ambiguity concerning the grievor, and others. The grievor is not a suspected abuser. Jurisdiction will be retained for three months to ensure the undertakings concerning the innocent employees are fulfilled.

The policy grievance fails on the first and third grounds. The letters are not intended as discipline and any past or future uncertainty of an employee's status has been eliminated by the employer's actions. The requirement that the employee pay the medical expenses directly contravenes the collective agreement and is upheld.

At present, company rules are only subject to a reasonableness test where the management rights clause is explicitly limited, not the case here, or the rule deals with discipline or seniority, again not the case here. The category of protected interest ought to be expanded only where the requirement that rules not breach the agreement does not afford employees basic protection of the job interest and where this cannot be dealt with in subsequent negotiations. Neither condition being present the rule is not subject to a reasonableness test and the grievance fails. In the alternative the rule is found to be reasonable, though perhaps not the best possible arrangement. This award is not to be considered authority for the proposition that management is free to act in bad faith in the absence of express restrictions, as bad faith was not alleged here.

AUTHORITIES: Atomic Energy of Canada Limited and Harvey K. Timmons (Oct. 14, 1983 unreported) (McDougall); Re Falconbridge Nickel Mines Ltd. and Sudbury Mine, Mill and Smelter Workers' Union, Local 598, (1982), 4 L.A.C. (3d) 274 (Saltman); Canadian Airline Employees Association and Eastern Provincial Airways (1963) Limited (unreported May 1, 1980) (Christie); Re Notre Dame Integrated School Board and Newfoundland Teachers' Association (1978), 22 L.A.C. (2d) 286 (Harris); Re Owen Sound General and Marine Hospital and Ontario Nurses' Association (1977), 16 L.A.C. (2d) 11 (Singer); Palmer, Collective Agreement Arbitration in Canada (1983 ed) p. 278; Brown and Beatty, Canadian Labour Arbitration (1984) (2nd ed) 4:1500; Re Thompson And Town of Oakville, Re Ruelens and Town of Oakville (1963), 41 D.L.R. (2d) 294; Re Martindale Sash & Door Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 802 (1972), 1 L.A.C. 324 (Clark); Re Oshawa General Hospital and Ontario Nurses' Association (1976), 12 L.A.C. (2d) 182 (O'Shea); K.V.P. Ltd. (1965), 16 L.A.C., 83 (Robinson); Nova Scotia Nurses' Union (Halifax Infirmary Local) v. Halifax Infirmary Hospital (1983), 54 N.S.R. (2d) 289 (N.S.S.C.A.D.); Re Metropolitan Toronto Board of Commissioners of Police and Toronto Metropolitan Police Association et. al., (1981) 124 D.L.R. (3d) 684 (O.S.C.A.); Canadian Keyes Fibres (1974), 8 N.S.R., (2d) 81 (N.S.S.C.A.D.); Re Photo Engravers and Electrolyzers and Toronto Printing Pressmen and Assistants Union, Local 10 (1980), 25 L.A.C. (2d) 88 affected on appeal subnorm; Re Council of Printing Industries of Canada and Toronto Pressmen and Assistants' Union Local, 10 et. al. (1983), 42 O.R. (2d) 404 (Ont. C.A.); Her Majesty the Queen in Right of Ontario as Represented by the Minister of Health and Ontario Public Service Employees Union G. R. Lenehan and the Grievance Settlement Board (unreported Ont. Div. Crt., Sept. 3, 1982).

DECISION: 84-121

Nova Scotia Liquor Commission AND Nova Scotia Government Employees Union

N. M. Scaravelli, Arbitrator

R. A. Pink, for the union

J. C. Leefe, for the employer

December 4, 1984

ISSUE: Arbitrability: Agreement as Primary Source of Jurisdiction 2:1200, 4:2000, Matter Arising Outside Agreement 2:1200, Interpretation 4:2000.

CIRCUMSTANCES: Due to bad weather the store did not open until 2:00-2:30 p.m. on the day in question. The grievors were docked an entire day's pay as they were unable to make it to work. The union argues that closures due to storms comes under the heading of working conditions and is therefore arbitrable. As such the union argues the grievors ought to lose only that portion of their salary during which the store was open. The employer contends that storm closures are not included in working conditions and in the absence of a specific breach of the collective agreement the grievance is not arbitrable.

AWARD: The grievance fails. The collective agreement does not define the term "working conditions" and little authority is available on its interpretation. In some cases involving police officers it has been given an expanded meaning but the same concerns are not applicable here. As such there is nothing to stretch the term beyond its ordinary meaning of conditions under which employees work and the grievance fails as not falling under the collective agreement.

AUTHORITIES: Palmer; Metropolitan Toronto Police, 57 D.L.R. (3d) 161; Scarborough Firefighters Association (1979), 26 O.R. (2d) 298 (Div. Crt.).

DECISION: 84-122

F. A. Tucker (Atlantic) Limited AND International Brotherhood of Electrical Workers, Local 1928

S. Bruce Outhouse, Arbitrator

Raymond F. Larkin, for the union

Terry L. Roane, for the employer

December 13, 1984

ISSUE: Interpretation: Intention of the Parties 4:2100, Management Rights 4:2300, 5:0000.

CIRCUMSTANCES: The collective agreement provided for a room and board allowance when an employee had to work more than thirty miles from "place of hiring" (Article 12.02). The employer (in Truro) contacted the union office (in Halifax) requesting two electricians. The union phoned the men at home, notified the employer and had the men report to the work site in Springhill. The grievors did not receive a room and board allowance.

The union argues that the "place of hiring" is more probably the employees residence, or either the employer's office or the union office but definitely not the job site in Springhill. All of the first three places would entitle the grievors to the allowance. The employer argues the only sensible result would be to consider the job site at Springhill the "place of hiring".

The parties agreed to convert this to a policy grievance with jurisdiction retained in the arbitrator if they could not resolve the particular disputes. The facts were not in dispute.

AWARD: The grievance fails. The requirement of a union referral does not remove from management the right to hire employees. Explicit words are necessary to remove such a right. Not only are these lacking but the collective agreement expressly refers to the employer hiring.

Neither the union office or the employer's office are the "place of hiring". If that was intended it could easily have been stated. While it is true that place of residence has certain advantages for employees it has disadvantages for the employer. Again it could have been used implicitly. Here the job site was the "place of hiring" as that is the first place of work, the first contact with the employer where the job application was filled out.

Where the "place of hiring" is a question of fact, it need not always be the job site.

AUTHORITIES: Entores Limited v. Miles Far East Corporation, (1955) 2 All. E.R. 493 (C.A); Re Viscount Supply Co. Ltd. (1963), 40 D.L.R. (2d) 501 (B.C.S.C.).

DECISION: 84-123

Atlantic Provinces Special Education Authority AND The Nova Scotia Teachers Union

Michael B. Sherar, Arbitrator

George Mitchell, for the union
Eric Durnford, for the employer
November 30, 1984

ISSUE: Standard of Proof 3:2500; Examination of Witnesses 3:3220; Taking a View 3:3300; Character Evidence 3:4500; Types of Evidence: Expert Evidence 3:4600, Weighing the Evidence 3:5100; Sexual Harassment 7:3580; Disciplinary Penalties: Set by Collective Agreement 7:4100.

PART 2

SUBJECT INDEX, 1978 - 1984

SUBJECT INDEX

- Abandonment ... 78-17, 78-25, 79-21, 79-22, 79-31, 79-50, 79-54, 83-17, 84-54
Absenteeism SEE Discipline and discharge; Illness and disability
Adjournment ... 80-22, 82-39, 84-21
 -Change of grounds ... 79-18, 82-64
 Discipline ... 79-18, 79-32
Alteration of Grounds SEE also Discipline and discharge ... 84-75
Apprenticeship and Tradesmen's Qualifications Act ... 83-08
Arbitrability
 -Agreement as primary source of jurisdiction ... 78-03, 79-22, 80-153,
 82-06, 82-92, 83-85, 83-86, 84-121
 -The collective agreement ... 79-12, 79-22
 -Grievance as limitation on ... 84-85
 -Matters arising outside of agreement ... 79-58, 80-32, 81-80, 82-57,
 84-102, 84-121
 -Prior awards SEE Resjudicata
 -Procedural limitations
 Form of grievance ... 78-32, 83-14, 83-19
 Policy and individual grievances ... 83-14
 Raising new grounds ... 79-18, 84-75
 Discipline cases ... 79-18, 82-33
 Waiver of procedural irregularities ... 82-29, 83-07, 83-19, 83-32
 -Settlement of grievance ... 83-17
 -Statutory requirement ... 79-16, 79-22, 79-24, 79-28, 79-29, 80-147, 84-50
 -Subject matter limitations ... 80-128, 83-80, 84-83
 Probationary employees ... 79-24, 80-147
 -Submission to arbitration ... 79-12, 79-22, 82-48, 82-51, 82-79, 83-14,
 84-83
Assignment of work SEE Work assignment
Award of Board of Arbitration SEE ALSO Remedies
Award of Board of Arbitration
 -Binding effect ... 82-85, 84-78
 Persons not bound ... 82-109
Bargaining unit
 -All employees unit ... 79-13, 82-56
 -Bargaining unit work SEE Work assignment
 -Definition ... 84-112
 -Employees excluded ... 78-01, 79-13, 84-23, 84-58
 Supervisors and foremen ... 81-26, 84-23
 Temporary, casual or part-time ... 79-13, 82-36, 82-69
 -Work assignment SEE Work assignment
Benefits SEE ALSO Bereavement leave; Call-in pay; Cost of living allowance;
 Illness or disability; Insurance and welfare plans; Overtime; Pension plans;
 Pregnancy; Severance pay; Statutory holidays; Travel Allowance; Vacation
 -Alteration of gratuitous benefits ... 81-89
Bereavement leave SEE ALSO Leave of absence
 -Duration ... 83-59
 -Entitlement while absent ... 80-41
 -Interpretation of day ... 80-41

Board of Arbitration

- Award SEE Award of Board of Arbitration
- Establishment ... 79-32, 79-55
- Impartiality ... 78-15, 79-32, 79-55, 81-24, 81-81, 81-82, 81-111
- Jurisdiction SEE Arbitrability
- Nominees ... 79-32
- Powers - Costs ... 84-21

Bonuses ... 82-50

Burden of proof SEE Evidence

Business records SEE Evidence

Call-in pay ... 78-43, 81-02, 81-05, 81-11, 81-55, 82-49

Certification orders ... 80-50, 80-51

Check-off SEE Union

Civil Service Joint Council Act ... 80-02, 80-146, 80-153

Classification SEE Job classifications and descriptions

Collective agreement

- Amendments ... 84-39
- Binding effect
 - Determination of ... 82-39
 - Party ceased to exist ... 80-60, 80-119
- Construction SEE Interpretation
- Essentials ... 82-66
- Form and content ... 78-04, 78-25, 79-07, 79-09, 79-31, 79-57, 80-158, 82-66
 - Ancillary documents ... 79-42, 80-30, 80-70, 80-164, 80-176, 82-46, 83-02, 84-32, 84-39
 - Amendments ... 78-25, 83-45
 - Company rules ... 79-04, 79-07, 82-17
 - Pension, insurance and welfare plans ... 78-04, 78-25, 79-09, 83-13
 - Supplementary agreements ... 79-42
- Individual contracts of employment SEE Arbitrability
- Limitations ... 83-77
- Matters arising outside of ... 78-29, 79-08, 79-12, 79-53, 79-58, 80-24, 80-70, 80-164, 81-123, 82-08, 82-55, 84-81
- Memorandum of agreement ... 84-39
- Sources of jurisdiction SEE Arbitrability
- Term of operation ... 78-25, 80-73, 82-70, 82-112, 82-115, 83-50, 84-39
 - Retroactivity ... 79-08, 79-12, 80-13, 80-122, 82-12, 82-70, 83-45
- Company rules ... 79-04, 79-07, 80-05, 80-130, 80-138, 80-169, 81-98, 82-21, 82-25, 82-44, 82-52, 83-75, 83-77, 83-102, 84-97, 84-98, 84-113, 84-120
- Collective agreement ... 79-04, 79-07, 80-130, 80-133, 82-17, 82-102, 84-97, 84-98
- Illness or disability ... 79-02, 79-33, 80-05
- Medical examination ... 79-04, 82-25, 82-52
- Off-duty behaviour ... 78-24, 80-118
- Penalty ... 79-60, 80-131, 80-138
- Personal appearance ... 78-21
- Safety equipment ... 83-102, 84-97

Compliance order SEE Remedies

Conflict of interest ... 80-142, 82-46

Consultation

- Required by collective agreement ... 82-18

Contracting out ... 81-31, 81-45, 82-58, 82-65, 82-108, 83-50

Contracts of employment

- Collective bargaining pre-empts ... 78-26, 78-29, 79-08, 79-12, 79-53, 79-58, 80-24, 80-164, 82-69, 82-70, 83-24, 83-64

Costs

- Power of board to award ... 84-21, 84-95

Cost of living allowance ... 80-70, 80-139, 80-156, 81-87

Courts

- Contracts of employment SEE Contracts of employment

- Judicial review SEE Judicial review

Culminating incident SEE Disciplinary penalties - Culminating incident

Damages SEE Remedies

Declaration SEE Remedies

Discharge SEE Discipline and discharge; Termination

Disciplinary penalties ... 84-116

- Arbitral review

Scope ... 80-36, 82-40, 83-09, 83-40, 83-52, 84-108

Substitution of penalty ... 78-28, 78-38, 78-39, 78-41, 81-08, 83-23, 83-102, 83-108, 84-47, 84-56, 84-109, 84-111

- Culminating incident ... 78-23, 80-07, 80-28, 80-84, 80-89, 80-99, 81-22, 81-67, 81-111, 82-19, 82-33, 82-91, 83-10, 83-35, 83-70, 83-96, 83-112, 84-06, 84-13, 84-14, 84-24, 84-56, 84-86, 84-108

Innocent absenteeism ... 84-05, 84-13

Theft ... 78-05, 78-37, 80-131, 81-62, 83-09, 83-72, 83-108

- Disciplinary record ... 84-86

- Mitigating factors ... 78-28, 78-39, 79-46, 80-161, 82-33, 82-37, 82-46, 82-91, 82-104, 82-107, 83-19, 83-23, 84-77, 84-113

Compassion ... 78-20, 84-87

Condonation

Isolant behaviour ... 78-33, 78-37, 78-38, 80-03, 80-20, 81-22, 81-67, 81-111

Discrimination ... 78-21, 80-141, 82-19, 82-40, 82-100, 84-03, 84-68

Economic hardship ... 78-20, 84-87

Employees state of mind ... 78-20, 84-87

Fighting ... 80-16, 80-68

Theft ... 78-05, 78-37, 80-131, 83-23, 83-72, 84-87

Employment record ... 78-20, 80-20, 81-79, 82-109, 83-52, 83-72, 83-75, 83-112, 84-06, 84-24, 84-47, 84-87, 84-113

Falsifying records ... 80-05, 80-91

Insolent behaviour ... 83-96, 84-06

Failure to warn

Lateness ... 78-07, 78-42, 79-24, 80-178

Work performance ... 78-07, 78-20, 78-23, 78-24, 78-33, 78-42, 79-02, 79-11, 79-46, 80-02, 80-44

Onus ... 84-40

Provocation ... 78-28, 78-38, 80-20, 83-102

Assault ... 80-16, 80-68, 82-40

Refusal to obey order ... 78-11, 79-33

Unlawful strike ... 79-47, 80-73, 80-87, 80-93, 80-141

Reasonable personal excuse SEE ALSO Discipline and discharge

Absence ... 80-117, 80-161, 80-172, 80-178, 82-63, 83-06, 83-09, 83-53

Lateness ... 81-85

Refusal to work overtime ... 80-64

- Rehabilitative potential ... 80-02, 80-43, 80-107, 84-06, 84-40, 84-56, 84-90
- Theft ... 78-05, 78-37, 80-131, 83-05
- Work performance
 - Isolated instance ... 78-07, 78-20, 78-23, 78-24, 78-33, 78-42, 79-02, 79-11, 79-46, 80-02, 80-44
- Progressive discipline ... 80-107, 81-09, 84-86
- Reasonableness ... 84-14, 84-66, 84-68, 84-94, 84-111
- Types of penalties
 - Demotion or transfer ... 79-20, 83-01, 83-90, 84-44, 84-61, 84-113
 - Loss of seniority
 - Abuse of leave of absence ... 78-42, 80-38, 80-109, 80-115
 - An authorized absence ... 84-71
 - Monetary penalties
 - Fines ... 81-96, 84-101
 - Work performance ... 78-07, 78-20, 78-24, 78-33, 78-42, 79-02, 79-11, 79-46, 80-02, 80-44, 84-03
 - Multiple penalties ... 81-08, 84-61
 - Nature of penalties ... 78-28, 79-43, 80-02, 81-08, 81-58, 81-120, 82-19, 82-33, 82-46, 82-75, 82-78, 83-56, 83-75, 83-90, 83-96, 83-108, 83-112, 83-116, 84-14
- Disciplinary penalties
 - Types of penalties
 - Set by collective agreement ... 80-31, 80-172, 81-10, 84-123
 - Warning ... 79-43, 80-02, 83-116, 84-69, 84-79, 84-89, 84-90, 84-108, 84-109, 84-127
 - Union officials ... 79-47, 80-170, 82-100
 - Warning ... 84-06, 84-44, 84-90
- Discipline and discharge
 - Alteration of grounds ... 84-75, 84-86
 - Burden of proof ... 84-76, 84-77
 - Company rules SEE Company rules
 - Culminating incident SEE Disciplinary penalties
 - Evidence SEE ALSO Evidence
 - Burden of proof ... 79-11, 79-19, 79-36, 80-165, 80-166, 81-30, 81-43, 81-124, 83-30, 83-55, 84-10, 84-76, 84-77, 84-87, 84-113
 - Confessions ... 84-87
 - Evidence
 - Final ... 84-75
 - Standard of proof ... 78-05, 80-12, 80-16, 80-55, 80-131, 80-165, 80-166, 82-106, 84-38, 84-77, 84-79, 84-87
 - Grounds for
 - Absence from work ... 79-02, 79-60, 80-15, 80-53, 80-117, 80-120, 80-138, 80-161, 80-172, 81-10, 81-114, 82-05, 82-17, 82-63, 82-96, 83-09, 84-75
 - Failure to notify employer ... 79-60, 80-05, 80-07, 80-31, 80-138, 80-161, 82-17, 83-32, 83-53, 84-35, 84-44
 - Innocent distinguished ... 84-05, 84-13
 - Incarceration ... 78-24
 - Reasonable excuse ... 80-117, 80-161, 80-172, 80-178, 83-06, 83-09, 83-32
 - Abuse of leave of absence ... 78-42, 80-38, 80-109, 80-115
 - Alcoholic beverages or drugs ... 78-36, 79-07, 79-11, 79-27, 80-02, 80-43, 80-78, 80-92, 80-107, 81-43, 82-17, 82-96, 83-06, 83-35, 83-98, 84-05, 84-38, 84-76

Attitude ... 84-86
Criminal convictions ... 78-24
Damage to employers property ... 80-112
Disability ... 84-05, 84-13, 84-40
Dishonesty ... 78-37, 80-118, 82-99, 82-104
Failure to get along with workmates ... 79-18, 81-20, 83-22
Falsification of records ... 80-05, 80-91, 83-75
Fighting or threatening ... 80-16, 80-68, 82-40, 82-107, 83-19, 83-40,
83-96, 84-10, 84-47
Illness or disability SEE Illness or disability
Insolent behaviour or obscene language ... 78-33, 78-37, 78-38, 80-03,
80-20, 82-91, 83-19, 83-40, 83-96, 84-06, 84-55, 84-86
Insubordination SEE Refusal to obey instructions
Lateness ... 78-07, 78-42, 79-24, 80-178, 81-85, 83-98, 84-03, 84-24,
84-35, 84-55, 84-90
Leaving work without permission ... 78-11, 78-28, 79-27, 80-07, 80-36,
80-79, 80-89, 80-144, 80-151, 81-06, 81-09, 81-10, 81-30, 81-52, 81-54,
81-70, 82-17, 84-68, 84-86, 84-94
Off-duty conduct ... 78-24, 80-118
Criminal conduct ... 78-24
Personal appearance ... 78-21, 84-79
Refusal to cross picket line ... 79-43, 79-46
Refusal to obey instructions ... 78-23, 78-36, 78-38, 79-19, 79-23, 79-26,
79-33, 79-45, 80-11, 80-28, 80-36, 80-39, 80-53, 80-65, 80-83, 80-84,
80-93, 80-169, 81-07, 81-16, 81-20, 81-36, 81-68, 81-84, 81-86, 81-91,
81-94, 81-103, 81-120, 82-01, 82-19, 82-28, 82-34, 82-75, 82-78,
82-87, 83-10, 83-22, 83-53, 83-70, 83-75, 83-77, 83-96, 83-102, 84-06,
84-56, 84-66, 84-89, 84-127
Health and safety ... 80-11, 81-07, 81-84, 83-09, 83-102
Leave of absence ... 82-17
Personal appearance ... 82-19
Reasonable personal excuse ... 78-11, 79-33, 80-109, 83-102
Sleeping on the job ... 80-18, 81-22
Discipline and discharge
-Grounds for
Refusal to obey instructions
Theft ... 78-05, 78-37, 80-12, 80-55, 80-131, 80-165, 80-166, 81-62,
81-79, 82-99, 82-106, 82-109, 83-05, 83-23, 83-52, 83-55, 83-71,
83-72, 83-108, 84-77, 84-87, 84-113
Unlawful strike ... 80-73, 80-87, 80-93, 80-141
Hot cargo or struck work clause ... 79-43, 79-46
Work overtime ... 78-42, 79-10, 84-116
Compulsory overtime ... 79-10, 80-151
Reasonable personal excuse ... 84-116
Sleeping on the job ... 84-20
Work performance ... 82-32, 82-87, 83-30
Carelessness ... 78-20, 80-112, 80-171, 81-08, 82-19, 82-33, 82-37,
83-37, 83-56, 84-55, 84-69, 84-86, 84-108, 84-109, 84-113
Incompetence ... 79-11, 79-26, 79-33, 80-53, 80-89, 80-168, 80-171,
81-20, 81-28, 81-119, 81-124, 83-15, 83-22, 83-30, 83-90, 84-40,
84-55, 84-79
Isolated occurrence ... 83-112

- Unsuitability ... 78-21, 79-11, 79-33, 81-67, 83-15, 84-79
- Sexual harassment ... see Sexual Harassment
- Just cause ... 79-18, 79-19, 79-27, 79-36, 79-59, 80-03, 80-08, 80-11, 81-01, 81-99, 82-05, 82-63, 83-37, 84-104, 84-111
- Obligation of explanation ... 83-05, 83-23, 83-75
- Prior record ... 81-52, 81-54, 84-06, 84-108, 84-127
- Procedural limitations on discipline ... 79-32, 80-40, 81-14, 82-30, 82-42, 82-95, 83-32, 84-40, 84-129
- Delay ... 84-10
- Quit distinguished ... 78-07, 79-59, 80-37, 80-39, 82-53, 82-97
- Raising new grounds ... 79-18, 79-32
- Union officials ... 82-100
- Responsibility for conduct of others ... 79-47, 80-170
- Unsuitability ... 84-33
- Warning
- Failure to warn ... 78-07, 78-20, 78-23, 78-24, 78-33, 78-42, 79-02, 79-11, 79-46, 80-02, 80-44, 81-124, 82-33, 83-15, 83-37, 83-77, 83-108, 83-112
- Warning as discipline ... 79-43, 80-02, 83-116
- Discrimination ... 82-03, 82-48, 82-63
- Age ... 79-37, 80-63, 81-39
- Discipline ... 78-21, 81-32, 81-91, 82-19, 82-78, 82-100
- Unlawful strike ... 78-21, 79-48, 80-141, 82-100
- Sex
- Work assignment ... 80-14
- Documents SEE Evidence
- Duty of fair representation ... 79-32, 80-57
- Employee
- Defined ... 79-13, 84-27
- Independent contractor distinguished ... 80-127, 82-65
- Disability ... 82-114, 83-06, 83-09, 83-71
- Disciplinary penalties SEE Disciplinary penalties
- Employment status
- Absent due to illness ... 78-13, 78-14, 78-29, 79-42
- Entitlement to a job ... 84-35
- Layoff ... 83-29
- Strike ... 83-24
- Probationary employee SEE Probationary employee
- Employer grievance ... 78-30, 78-32, 78-45, 79-12, 79-35, 79-47, 79-51, 80-57
- Employment record SEE Disciplinary penalties; Discipline and Discharge
- Employment status SEE Employee
- Estoppel ... 80-24, 80-59, 80-61, 80-74, 81-65, 81-71, 81-97, 82-58, 82-92, 82-95, 82-98, 83-01, 83-13, 83-16, 83-18, 83-19, 83-24, 83-39, 83-54, 83-81, 83-88, 84-07, 84-22, 84-29, 84-39, 84-72
- Change of grounds ... 82-70
- Condonation ... 84-88
- Delay in complaining of grieving ... 83-28, 83-31, 83-48
- Individual contracts ... 80-24, 84-72
- Issue estoppel SEE Resjudicata
- Oral agreement ... 81-71
- Procedural irregularities not object to ... 79-34, 79-51, 79-55, 79-60, 80-19, 80-26, 83-19

- Evidence ... 80-101, 84-61, 84-127
 - Admissibility ... 82-87, 84-75
 - Relevance ... 80-176, 82-69, 84-86
 - Board of Arbitration
 - Seeking evidence ... 79-03, 79-05
 - Burden of proof ... 79-25, 79-40, 79-43, 82-56, 82-86, 83-04, 83-26, 83-30, 83-50, 83-51, 83-55, 83-84, 83-88, 83-104, 84-76
 - Applications
 - Demotion ... 79-11, 79-19, 79-36
 - Nondisciplinary ... 78-21
 - Discipline ... 83-55, 84-10, 84-125
 - Illness ... 83-82
 - Qualifying for benefits ... 78-13, 79-60, 80-56, 80-123
 - Return to work ... 78-14, 80-104
 - Burden, weight of ... 80-12, 80-16
 - Disciplinary cases ... 78-05, 80-55, 80-131, 80-165, 80-166
 - Documents
 - Admission into evidence ... 83-03, 84-125, 84-127
 - Exclusionary rules ... 84-86
 - Hearsay ... 84-61
 - Presentation of evidence
 - Examination of witness ... 84-123
 - Interpreter ... 84-123
 - Re-examination ... 80-101
 - Standard of Proof ... 84-10, 84-123, 84-125
 - Discipline ... 84-10
 - Types of evidence
 - Character
 - Evidence ... 84-123
 - Confession ... 84-87
 - Expert Evidence ... 84-123, 84-125
 - Extrinsic evidence ... 79-21, 79-44, 80-158, 82-71, 83-27, 83-45, 84-30, 84-48, 84-83, 84-115
 - Types of negotiating history ... 80-54, 82-71, 83-54, 83-111, 84-83
 - Types of past practice ... 79-14, 80-04, 80-33, 80-58, 80-93, 80-96, 80-125, 81-65, 81-71, 81-72, 81-73, 81-75, 81-77, 81-115, 82-71, 82-83, 82-85, 83-16, 83-33, 83-59, 83-67, 83-87, 83-94, 83-95, 83-115, 84-07, 84-29, 84-30
 - Medical records ... 78-14, 80-104
 - View ... 84-123, 84-125
 - Weighing the evidence ... 80-18, 80-79, 84-28, 84-31, 84-61, 84-111, 84-123
 - Witness SEE Witness
- Examinations SEE Skill and ability
- Fairness
 - Context of collective bargaining ... 84-131
- Foremen SEE Supervisors
- Fringe benefits ... 78-29, 78-32, 78-43, 84-08
- Functus officio ... 82-79, 83-89
- Grievance
 - Abandonment SEE ALSO Laches
 - Abandonment ... 78-17, 79-50, 79-54, 80-52, 83-42
 - Arbitrability SEE Arbitrability
 - Form of grievance ... 78-32, 80-62, 80-82, 80-105, 81-27, 81-49, 81-126, 83-14, 83-19, 83-42, 83-105

Grievance

- Group grievance ... 78-32, 82-71, 83-74, 83-105
- Particularly SEE Particulars
- Policy grievance ... 78-32, 79-25, 80-23, 82-88, 83-14, 83-28, 83-42, 83-67, 83-83, 83-111, 84-11, 84-36
- Settlement of grievance ... 78-17, 79-22, 79-50, 79-54, 83-17, 83-51, 83-98
- Withdrawal of grievance ... 78-17, 79-21, 79-50, 79-54, 80-52, 83-17, 83-42

Grievance arbitration

- Nature of the process ... 79-23, 82-25

Grievance procedure

- Compliance with ... 78-30, 78-32, 78-45, 79-12, 79-51, 80-57, 82-42, 82-85, 83-103
- Discipline procedures ... 82-30, 82-42
- Procedural limitations on arbitrability SEE Arbitrability
- Relief against non-compliance ... 78-45, 79-43, 79-57, 80-26, 80-168
- Time limits SEE Time limits
- Union control of ... 79-32, 80-57
- Waiver of irregularities ... 79-34, 79-51, 79-55, 79-60, 80-19

Grievor

- Ceasing to be employee (includes deceased) ... 82-109

Health plans SEE Insurance and welfare plans

Holiday pay SEE Statutory holidays

Hours of work SEE Working hours and shifts

Human Rights Act - Discrimination ... 80-63

Illegal strike SEE Strikes and lockouts

Illness or disability

- Benefits SEE Insurance and welfare plans
- Burden of proof
 - Employer allegations ... 84-125
 - Qualifying for benefits ... 78-13, 79-60, 80-56, 80-123, 80-148, 83-69, 83-116, 84-09
 - Return to work ... 78-14, 80-104, 82-96
- Effect on employee
 - Ability to do job ... 79-37, 79-51, 80-14, 80-63, 82-114, 84-76
 - Absence from work ... 80-120, 81-69, 82-05, 83-06, 83-09
- Employer response
 - Alternatives to termination
 - Absenteeism ... 81-106, 83-06, 83-09, 83-26, 83-82, 84-44, 84-125
 - Inability to work properly ... 81-61, 82-114, 83-09, 83-71
 - Onus ... 84-40
 - Discipline
 - Absenteeism ... 79-02, 80-136, 81-69, 81-106, 83-06, 83-09
 - Inability to work properly ... 83-09, 83-71
- Employment status ... 78-13, 78-14, 78-29, 79-42, 82-25, 82-26
- Entitlement to a job ... 78-14, 82-96
- Holiday pay
 - Entitlement ... 80-137, 80-174
- Medical examinations ... 79-04, 80-123, 80-148, 82-25, 82-26, 84-120
- Proof of recovery ... 84-125
- Return to work ... 78-14, 80-136, 80-155, 81-78
- Sick leave SEE ALSO Leave of absence
- Sick leave ... 82-25, 82-26

-Vacations

- Entitlement ... 79-42, 79-61, 80-13, 82-110

Incentive rates

- Establishment and termination ... 82-10
- Setting or altering the rate ... 81-102
- Independent contractors SEE Contracting out
- Individual contracts of employment SEE Contracts of employment
- Industrial Safety Act ... 82-102
- Innocent absenteeism ... 84-75, 84-76, 84-125
- Insubordination SEE Discipline and discharge
- Insurance and welfare plans

- Calculation of benefits ... 84-102
- Entitlement to benefits ... 78-13, 79-60, 80-56, 80-123, 82-57, 82-110, 83-69, 83-91, 83-116, 84-09, 84-73, 84-117 84-119
- Incorporation into collective agreement ... 83-13, 84-96
- Payment of premiums ... 80-27, 82-45, 82-54, 83-63

Interest arbitration

- Authority to decide interest disputes ... 80-70
- Distinguished from grievance arbitration ... 78-25, 78-26, 80-146
- Wage disputes ... 80-70

Interpretation ... 78-16, 78-39, 78-46, 79-14, 79-16, 79-17, 79-20, 79-25, 79-35, 79-42, 79-44, 79-53, 80-04, 80-15, 80-35, 80-41, 80-45, 80-54, 80-81, 80-126, 80-128, 80-134, 80-137, 80-139, 80-140, 80-154, 80-156, 81-03, 81-11, 81-15, 81-17, 81-18, 81-19, 81-34, 81-44, 81-76, 81-77, 81-90, 81-93, 82-10, 82-20, 82-105, 82-113, 82-116, 83-16, 83-33, 84-52, 84-63, 84-73, 84-121

- Administrative feasibility ... 80-15, 80-17
- Aids to interpretation ... 83-41, 84-131
- Dictionaries ... 83-11, 83-44, 84-80, 84-105, 84-124
- Past practice ... 84-102
- Prior agreements ... 83-87, 84-124
- Prior awards and court decisions ... 83-21
- Statutes ... 84-78

- Ambiguity ... 84-102
- Context ... 79-25, 79-35, 79-42, 80-15, 82-23, 82-38, 82-82, 82-93, 83-20, 83-61, 83-84, 84-59, 84-131
- Definitions ... 80-126, 80-128
- Dictionaries ... 83-11, 84-80, 84-124
- Extrinsic evidence SEE Evidence ... 84-30
- Good faith ... 84-131

- Intention of the parties ... 78-39, 78-46, 79-35, 79-42, 80-04, 80-15, 80-17, 80-35, 80-39, 80-41, 80-45, 80-54, 80-81, 80-126, 80-128, 80-134, 80-137, 80-139, 80-140, 80-150, 80-154, 80-156, 81-40, 82-12, 82-13, 82-27, 82-29, 82-67, 82-76, 82-94, 83-03, 83-11, 83-12, 83-14, 83-21, 83-27, 83-29, 83-33, 83-36, 83-39, 83-54, 83-59, 83-61, 83-63, 83-65, 83-68, 83-78, 83-86, 83-87, 83-92, 83-97, 83-110, 83-115, 84-01, 84-04, 84-08, 84-11, 84-18, 84-22, 84-29, 84-34, 84-59, 84-83, 84-103, 84-105, 84-112, 84-122, 84-124, 84-131

- Management rights ... 84-97, 84-98, 84-122
- Reasonableness ... 84-117, 84-131
- Statutes
 - As aid to interpretation ... 78-16
- Words and phrases ... 82-10, 82-20
 - And ... 80-35
- Day or work day ... 83-63

Jobs and classification

- Job ... 82-38
- Lay-off ... 84-100
- Length of service ... 84-84
- Measurement of time
 - Day or work day ... 80-150

Job classifications and descriptions

- Bargaining unit work defined by ... 79-13, 79-38, 80-09, 80-21, 80-47, 80-102, 80-113
- Creation or revision ... 81-100, 81-104, 82-41, 82-72, 82-73, 82-117, 83-01, 83-03, 83-12, 83-39, 83-76, 84-02, 84-48, 84-58, 84-66
- Bona fides ... 79-06, 82-29, 82-76, 82-82, 82-94, 84-02, 84-21, 84-46
- Change of work load ... 80-46, 82-31, 83-49
- Collective agreement limitations ... 83-111, 84-02, 84-46, 84-48
- Interpretation SEE Interpretation
- Performance of work outside SEE Work assignment
- Skill and ability SEE Skill and ability

Job descriptions SEE Job classifications and descriptions; Job posting; Work assignment

Job posting SEE ALSO Promotion, demotion and transfer; Skill and ability

- Job posting ... 78-06, 78-35, 79-01, 79-15, 80-143, 80-176, 81-76, 81-122, 81-123, 81-125, 81-126, 81-127, 81-128, 82-24, 82-51, 83-20, 83-31, 83-100, 84-22, 84-41, 84-46, 84-92
- Bona fides ... 79-06, 84-41
- Job description posted ... 82-24, 82-41
- Posting procedure .. 78-35, 79-01, 80-143, 80-176, 81-29, 82-51, 83-100, 84-118
- Vacancy, ... 79-01, 80-19, 80-34, 80-98, 80-143, 80-176, 82-81, 83-20, 84-128
- Withdrawal ... 79-01
- Judicial review ... 80-29, 80-48, 80-77, 80-86, 80-146, 81-51, 82-51, 82-52, 84-19
- Arbitral discretion ... 80-29
- Consensual arbitration ... 80-29, 80-86
- Grounds for review
 - Error of law on face of record ... 81-51
- Impartiality ... 78-15, 79-32, 79-55
- Standard of review of arbitral interpretation ... 81-107, 81-108
- Statutory arbitration ... 80-146

Jurisdiction

- Arbitral costs ... 80-09
- Arbitrability SEE Arbitrability
- Concurrent jurisdiction
 - Administrative agencies ... 80-85, 84-61
- Damages SEE Remedies
- Estoppel SEE Estoppel
- Interpretation of statutes ... 83-113
- Rectification ... 79-22
- Sources
 - Collective agreement ... 83-85, 83-86, 84-33 (Supp.), 84-104
 - Statutes ... 82-70, 82-95, 83-113, 84-49, 84-81
 - Submission to arbitration ... 79-12, 79-22, 83-14
- Jurisdictional dispute ... 80-121

- Laches ... 80-88, 80-124, 83-28, 83-31, 83-48, 83-93
- Layoff ... 78-10, 78-19, 78-26, 80-100, 82-64, 82-102, 82-103, 82-115, 83-18, 83-29, 83-47, 84-25, 84-107, 84-124
 - Bumping ... 78-26, 80-72, 80-145, 80-163, 80-167, 82-13, 82-14, 82-102, 82-103, 82-115, 83-18, 83-47, 83-101, 83-106, 84-60, 84-107
 - Upwards ... 80-26, 80-72, 80-167, 84-25
- Employment status ... 84-73
- Burden of proof ... 83-88, 84-12 (Supp.)
- Defined ... 80-100, 84-100
- Entitlement to benefits
 - Holiday pay ... 83-34
- For less than one shift ... 80-100, 80-108
- Notice ... 78-19, 82-62, 83-28, 84-78
- Recall SEE Recall
- Reduction of hours ... 79-41, 80-100 84-100
- Seniority
 - Applied ... 80-100, 82-07, 82-102, 82-103, 82-115, 83-18, 83-47, 83-49, 83-64, 83-83
- Skill and ability SEE Skill and ability
- Status of person ... 83-34
- Leave of absence SEE ALSO Bereavement leave; Illness or disability
- Leave of absence ... 78-42, 80-38, 81-89, 81-97, 82-03, 84-13
 - Unauthorized ... 80-109, 80-115
 - Union business ... 83-51
- Lockouts SEE Strikes and lockouts
- Lord's Day Act ... 80-151
- Lunch breaks
 - Overtime ... 79-40
- Management rights ... 79-17, 79-23, 79-25, 80-06, 80-123, 81-13, 81-29, 82-102, 83-49, 83-60, 83-116, 84-67, 84-122, 84-131
 - Classification ... 84-02, 84-57, 84-115
 - Company rules ... 84-120
 - Fairness ... 84-88, 84-101
 - Overtime ... 83-107
 - Schedules SEE ALSO Working Hours & Shifts
 - Schedules ... 84-85
 - Revision of job content ... 84-57
 - Work assignment ... 78-35, 79-01, 79-06, 79-30, 80-75, 80-114, 83-80
- Maternity leave SEE Pregnancy
- Medical examinations ... 79-04, 80-123, 82-52
- Medical plans SEE Insurance and welfare plans
- Medical records SEE Evidence
- Memorandum of agreement SEE Collective agreement
- Natural justice SEE Judicial review
- Negotiating history SEE Evidence
- Notice of hearing ... 80-19, 82-89
- Nova Scotia
 - Legislative framework ... 81-63
- Onus of proof SEE Evidence
- Overtime ... 84-26, 84-31, 84-91, 84-104
 - Burden of proof ... 82-29, 83-25
 - Compulsory ... 78-34, 79-10, 79-49, 80-151, 82-58, 84-116
 - Defining overtime ... 83-81
 - Daily overtime ... 78-22, 78-43, 79-52, 80-25, 80-150, 81-72, 81-74, 82-67, 83-111, 83-115, 84-126

- Overtime hours worked ... 79-40, 79-52, 80-25, 80-125, 80-175, 82-23, 82-44, 83-68, 83-87, 84-01, 84-37
- Qualifying time ... 79-40, 79-44, 79-52, 83-94
- Weekly overtime ... 78-22, 82-67, 83-65, 83-97
- Distribution of overtime ... 84-91
 - Equitable distribution ... 82-59, 83-107, 84-64
 - Persons normally performing ... 79-49, 80-58, 81-17, 81-112, 82-80, 84-32
- Management rights ... 81-77, 81-121, 81-130, 82-18
- Premiums ... 79-52
- Refusal to work ... 78-39, 78-41, 79-10, 80-64, 80-151, 81-105, 82-58
- Remedies ... 81-47, 82-43, 82-80, 82-85, 84-91
- Right to claim ... 78-44, 79-40, 79-49, 80-95, 80-159, 80-175, 80-177, 81-47, 81-112, 81-129, 81-130, 82-18, 82-29, 82-83, 83-25, 83-99, 84-51
 - Equitable distribution ... 78-09, 78-44, 79-49, 82-04, 82-58, 82-101
- Scheduling ... 78-09, 78-12, 78-31, 78-34, 78-44, 79-49, 80-64, 83-02, 83-111, 83-115
- Statutory holiday ... 79-44, 80-126, 82-11, 82-111
- Voluntary ... 78-34, 79-10, 79-49, 80-151, 82-58, 84-104
- Overpayment ... 80-88
- Part-time employee ... 81-88, 82-36, 82-69, 82-110, 83-46, 83-49, 83-50, 83-73, 83-91
- Particulars ... 84-50
- Parties & participants ... 83-18
 - Bringing grievance ... 81-41, 82-04
- Past practice SEE Evidence; Estoppel ... 84-07, 84-29, 84-30, 84-45, 84-64, 84-80, 84-82, 84-85, 84-106, 84-112, 84-115
- Pension plans ... 82-06, 82-45, 82-54, 84-96
 - Benefits ... 78-04, 78-25, 79-09, 82-111, 83-13, 83-27
 - Incorporated into agreement ... 84-96
- Personal appearance regulations ... 78-21
- Picket lines
 - Refusal to cross ... 79-43, 79-46
- Policy grievance
 - Limitations imposed by agreement ... 84-82
 - Nature of ... 78-32, 79-25, 80-23, 81-14, 81-21, 82-47, 82-88, 83-14, 83-28, 83-42, 83-67, 83-83, 83-111, 84-11, 84-36, 84-42, 84-62, 84-81
- Practice SEE Procedure
- Precedent
 - Prior award ... 79-31, 79-32
- Pregnancy
 - Leave
 - Vacation pay ... 82-113, 83-33
 - Medical benefits ... 81-61, 81-108, 84-117
- Preliminary objection SEE Procedure
- Probationary employee ... 80-147, 81-37, 81-53
 - Discipline or discharge ... 79-24, 80-23, 81-37, 81-53, 82-15, 83-30
 - Arbitrability ... 79-24, 81-37
 - Probationary period ... 80-152, 82-27, 83-73
- Procedure SEE ALSO Evidence
 - Adjournments SEE Adjournments ... 84-19
 - Order of procedure
 - Resignation ... 78-07, 79-59, 80-37, 80-39
 - Powers of Board Arbitration
 - Documents ... 84-50

- Pre-hearing disclosure ... 84-50
- Production of documents ... 84-50
- Relief against time limits ... 78-45, 79-43, 79-51, 80-26, 80-103, 80-168
- Splitting hearing ... 84-43, 84-12 (Supp.)
- Preliminary objections ... 79-03, 79-05, 79-31, 79-32, 79-57, 80-32, 80-78, 80-94, 80-157, 80-173, 81-12, 81-21, 81-24, 81-27, 81-103, 81-123, 82-06, 82-08, 82-57, 82-58, 82-70, 82-71, 82-77, 82-85, 83-14, 83-15, 83-19, 83-31, 83-48, 83-51, 83-66, 83-109, 84-19
- Prior award ... 82-58, 82-85, 82-86, 82-92
- Promotion, demotion and transfer
 - Demotion or transfer
 - Defined ... 79-30, 79-37, 80-98, 83-26, 83-92, 83-114, 84-25
 - Disciplinary ... 79-20, 81-91
 - Fairness ... 84-88
 - Non-disciplinary ... 78-21, 83-26, 83-57, 83-90
 - Absenteeism or inability to work ... 83-26
 - Bona fides ... 83-47, 84-88
 - Incompetence ... 80-06
 - Into unit ... 79-30
 - Union activity ... 81-29
 - Reasonableness ... 84-128
 - Promotion defined ... 78-06, 79-15, 79-37, 80-01, 83-92, 84-114
 - Promotion or transfer outside unit ... 79-28, 79-29
 - Seniority ... 78-18, 78-27, 79-15, 79-17, 79-28, 79-29, 79-37, 79-51, 80-01, 80-10, 80-69, 81-91, 81-95, 81-122, 81-123, 81-125, 81-126, 81-127, 81-128, 82-68, 82-76, 82-93, 82-94, 83-03, 83-57, 83-76, 83-84
 - Skill and ability SEE Skill and ability
 - Union officials ... 78-18
- Quit SEE Resignation
- Reasonableness
 - Company rules ... 84-120
- Recall ... 79-31, 80-69, 82-64, 83-31, 83-76, 83-103, 84-32, 84-33, 84-35, 84-107
 - Refusal ... 84-35
 - Seniority ... 78-10, 79-31, 79-51, 80-69, 82-64
 - Skill and ability SEE Skill and ability
 - Striking employees ... 82-64
- Reinstatement ... 79-59, 82-96, 82-97, 82-23, 83-108
- Remedies
 - Authority to award ... 80-116, 80-140, 82-22, 82-79, 83-51, 83-61, 83-86, 83-89
 - Substitution of penalties ... 83-23
 - Type of grievance ... 79-49
 - Contracting out ... 84-42
 - Discharge or suspension ... 82-22
 - Lay-off ... 84-12 (Supp.)
 - Overtime ... 82-43, 82-79, 82-80, 82-85, 84-51
 - Promotion ... 84-74
 - Union security
 - Damages ... 84-42, 84-49
 - Work assignment outside unit ... 81-48, 82-35, 84-110
 - Type of remedy
 - Compliance order ... 83-13
 - Damages
 - Authority to award ... 80-84, 82-79, 83-51, 83-61
 - Measure ... 82-50, 84-56 (Supp.), 84-95, 84-110

Mitigation ... 82-22
Burden of proof ... 84-42, 84-43
Punitive damages ... 80-116, 81-04
Rectification ... 79-22
Reinstatement ... 79-59, 82-96, 82-97, 82-99, 84-56
Restitution and set-off ... 79-59
Substitution of lesser penalty ... 79-59, 82-96, 82-97, 82-99, 84-47
Res Judicata ... 84-19
-Abandonment, settlement and withdrawal ... 79-31
-Decisions of other Boards of Arbitration ... 79-31, 79-32, 81-19, 81-31, 81-38, 83-55, 84-99
-Issue estoppel ... 79-32, 82-58, 82-85, 82-86, 82-92
Resignation ... 78-07, 79-59, 80-37, 80-39, 82-53, 82-97, 83-72
Rest breaks ... 80-140, 83-61
Retirement ... 82-21
Retroactivity ... 80-13, 80-122, 82-88, 84-104
-Wage schedules ... 80-96, 82-88
Rules SEE Company rules
Safety ... 83-60
-Equipment and clothing ... 83-102, 84-97
Schedules SEE Working hours and shifts
Seniority ... 78-10, 79-17, 79-58, 80-01, 80-10, 81-76, 84-114, 84-128
-Acquisition ... 78-30, 80-132, 83-48, 84-80
Non-unit employees ... 78-01, 83-58, 83-85, 83-114
Non-working periods ... 83-64
-Applications ... 79-37, 80-01, 81-80, 82-90, 82-102, 82-103, 83-18
Layoff ... 78-10, 78-19, 78-26, 79-51, 80-74, 80-100, 81-57, 82-07, 82-102, 82-103, 82-115, 83-18, 83-47, 83-49, 83-64, 83-83, 84-22, 84-80
Bumping ... 78-26, 80-72, 81-57, 82-102, 82-103, 82-115, 83-18, 83-47, 83-62, 84-128
Promotion, demotion and transfer SEE ALSO Promotion, demotion and transfer ...
Promotion, demotion and transfer ... 78-18, 78-27, 79-17, 79-28, 79-29, 80-01, 80-10, 81-91, 81-95, 82-68, 82-76, 82-93, 82-94, 83-03, 83-57, 83-84, 83-100, 84-74
Recall ... 79-31, 79-51, 80-69, 83-31, 83-103, 84-52, 84-71
-Loss of seniority SEE Disciplinary penalties
-Skill and ability SEE Skill and ability
-Termination of seniority ... 78-26, 78-30, 83-71
-Union officials ... 78-18, 80-74, 81-40
Severance pay ... 84-56 (Supp.)
Sexual harassment ... 84-111, 84-123
Shifts SEE Working hours and shifts
Sick leave SEE Illness or disability
Sick pay SEE Insurance and welfare plans
Skill and ability ... 78-06, 78-10, 78-18, 78-27, 79-15, 79-51, 80-10, 80-14, 80-66, 80-97, 80-129, 81-13, 81-35, 82-61, 82-68, 83-25, 83-62, 83-103, 84-22, 84-107
-Arbitral review ... 78-18, 79-15, 79-51, 80-06, 80-10, 80-97, 80-129, 81-122, 81-125, 81-126, 81-127, 81-128, 82-61, 82-68, 83-36, 83-58, 83-79, 83-83, 84-15, 84-16, 84-22, 84-41, 84-62, 84-74, 84-107

- Senior employee if relatively equal ... 80-14, 80-106, 80-160, 81-125, 81-126, 81-127, 81-128, 83-73, 83-79, 84-41
- Senior employee with required ability ... 78-10, 78-18, 79-51, 80-69, 80-72, 80-145, 80-163, 80-167, 81-25, 81-35, 81-39, 82-07, 82-61, 82-90, 83-31, 83-36, 84-12, 84-17, 84-60, 84-80, 84-107
- Burden of proof ... 78-18, 78-27, 79-51, 80-14, 80-106, 81-25, 81-39, 81-127, 81-128, 84-12, 84-33, 84-107
- Criteria of ability and qualifications ... 83-08, 83-79, 83-100, 83-106, 84-12, 84-15, 84-16, 84-17, 84-41, 84-106, 84-107, 84-114, 84-118
- Aptitude ... 83-79
- Bona fides of ... 78-18, 79-15, 80-67, 81-122
- Disciplinary record ... 78-27
- Education ... 80-72
- Physical capabilities ... 79-37, 79-51, 80-14, 80-63
- Requirments of the job ... 84-41
- Discrimination
- Age ... 80-63
- Sex ... 80-14
- Examinations and tests ... 78-06, 80-66, 83-03, 83-100, 84-62, 84-106, 84-107
- Interpretation SEE Interpretation
- Trial, training and familiarization period ... 80-145, 80-160, 80-163, 80-167, 81-25, 81-39, 82-61, 83-10, 83-47, 83-74, 83-101, 84-62
- Standard of proof SEE Evidence
- Statutes
- Aid to interpretation ... 78-16, 84-63
- Applied by Board of Arbitration ... 82-55, 83-113, 84-12, 84-28, 84-39, 84-42
- Statutory holidays ... 81-73, 84-65, 84-103
- Holiday falling on non-working day ... 80-33, 80-49, 83-43, 84-103
- Holiday pay and other benefits ... 80-137, 81-55, 82-11, 83-21
- Computation of vacation pay ... 78-32, 79-61
- Qualifying days ... 78-03, 79-14, 80-174, 83-105, 84-103
- Illness ... 80-174
- Layoff ... 83-34, 83-105, 84-103
- Work on day of holiday ... 79-44, 80-126, 81-19, 82-11, 84-82, 84-105
- Strikes and lockouts ... 82-58, 83-113
- Hot cargo and struck work clauses ... 79-43, 79-46
- Status of striking employees
- Benefits
- Service for vacation ... 84-84
- Unlawful strikes
- Damages ... 84-43
- Discipline ... 79-47, 80-73, 80-87, 80-93, 80-141
- Union officials ... 79-47, 80-87
- Union liability ... 81-110, 82-47
- Submission to arbitration SEE Grievance
- Supervisors
- Bargaining unit SEE Work assignment
- Return to unit
- Seniority ... 78-01
- Supervisory
- Excluded by recognition clause ... 83-66, 84-23

Suspension SEE Discipline and discharge

Temporary employee ... 81-83, 82-36, 83-46

Temporary, casual and part-time employee ... 84-31, 84-51, 84-65, 84-93,
84-104, 84-105, 84-112

Termination SEE ALSO Discipline and discharge

-Illness or disability SEE Illness or disability

-Resignation SEE Resignation

-Work not available ... 83-73

Tests SEE Skill and ability

Time limits

-Continuing grievance ... 78-30, 78-32, 78-40, 79-48, 79-51, 79-55, 79-60,
80-29, 80-103, 83-81, 84-71, 84-126

-Delay ... 80-77, 80-124, 81-27, 81-110, 83-28, 83-31, 83-48, 83-109

-Mandatory or directory ... 78-40, 79-34, 79-48, 79-60, 80-19, 80-52, 80-86,
80-94, 80-103, 80-124, 80-149, 81-12, 81-110, 82-47, 82-77, 82-88, 82-109,
83-13, 83-28, 83-31, 83-48, 83-83, 83-109, 84-05, 84-99

-Relief against non-compliance ... 78-45, 79-43, 79-57, 80-26, 80-149, 80-168

-Restriction on arbitrability ... 82-71

-Waiver of ... 79-34, 79-51, 79-55, 79-60, 80-19, 80-103

Trade union SEE Union

Trade Union Act ... 80-57, 80-119, 82-56, 83-13

Trade Union Act, s. 5.41 (d) ... 82-22

Trade Union Act, s. 7 ... 82-29

Trade Union Act, s. 33 ... 81-06

Trade Union Act, s. 39 ... 82-92

Trade Union Act, s. 40 (1) ... 81-37

Trade Union Act, s. 41 ... 83-23

Trade Union Act, s. 89 (c) ... 83-07

Trade Union Act, s. 103 ... 83-07

Training periods ... 80-145, 83-10, 83-47, 83-74, 83-78

Transfers SEE Promotion, demotion and transfers

Travel allowance ... 80-24, 81-49, 81-64, 82-48, 83-44

Unemployment Insurance Act ... 82-22

Union

-Activity and business ... 84-94, 84-129

On company time ... 84-94

On employer premises ... 79-35

-Dues

Check off ... 78-47, 79-39, 80-09, 80-42, 80-62, 81-63, 81-113

-Grievance ... 79-25, 80-57

Damages for violation of union security ... 84-42, 84-49

-Liability for unlawful strike ... 82-47, 82-100

Damages ... 82-47

Provocation ... 82-100

Vicarious responsibility ... 81-92

-Officials ... 79-47, 82-100

Discipline

Responsibility for action of others ... 79-47

-Recognition ... 79-58

-Rights ... 78-47, 80-21, 82-66, 83-11

-Security ... 80-22, 82-116, 83-11, 83-45, 84-70, 84-95

Check off ... 78-47, 79-39, 80-42, 80-135, 82-02, 82-06, 82-16, 82-38,
82-45, 82-66, 82-69, 82-89, 82-92

Remedies

Damages ... 82-108, 84-42, 84-53

-Supplying employees ... 81-115, 82-116, 84-53

- Unlawful strike SEE Strikes and lockouts
- Vacancy ... 79-01, 80-19, 80-98, 81-49, 81-88, 82-81, 83-20, 83-42, 83-49, 84-57
 - Job posting ... 78-35, 79-01, 79-15, 80-34, 80-143, 80-176, 83-20
- Vacation ... 79-21, 79-61, 81-15, 81-60, 82-111, 84-28
 - Computation of vacation and vacation pay ... 78-32, 79-61, 81-56, 81-59, 82-98, 83-24, 84-11, 84-34
 - Period of service ... 78-32, 79-21, 79-61, 80-80, 81-56, 84-34, 84-84
 - Earning defined ... 78-32, 79-61, 81-15, 84-11, 84-34, 84-84
 - Other benefits ... 82-110
 - Scheduling ... 80-90, 80-110, 80-130, 83-86
- Wages ... 78-02, 78-08, 79-08, 79-56, 83-74, 83-78, 84-07, 84-33 (Supp.), 84-124
 - Alteration of wages ... 83-41, 83-91, 83-92, 84-07, 84-29, 84-53, 84-124
 - Arbitration of rates ... 81-101, 81-118
 - Compliance with wage structure ... 84-131
 - Equal work for equal skill ... 83-38
 - Fringe benefits ... 84-08
 - Guaranteed weekly wage ... 78-08, 79-08, 82-71, 82-74, 84-29
 - Increases
 - Educational or experiential increments ... 82-88, 84-81
 - Merit increase ... 84-81, 84-130
 - Progressive wage increases ... 81-93, 83-46
 - Overtime pay SEE Overtime
 - Rates for new and revised classifications ... 83-38, 83-39
 - Reporting pay SEE Call-in pay
 - Retroactivity SEE Retroactivity
 - Setting rate ... 81-118
 - Time not worked ... 82-71
 - Withholding wages ... 81-96, 83-95
- Waiver ... 79-34, 79-51, 79-55, 79-60, 80-19, 82-57, 82-71, 83-07, 83-19, 83-32, 84-63
 - Estoppel distinguished ... 80-26
- Warning SEE Disciplinary penalties
- Welfare plans SEE Insurance and welfare plans
- Words and phrases SEE Interpretation
- Work assignment SEE ALSO Job classifications and descriptions ... 84-70, 84-78
 - Bargaining unit work ... 78-03, 79-13, 79-38, 80-09, 80-21, 80-47, 80-71, 80-75, 80-102, 80-113, 81-46, 81-48, 82-76, 82-81, 82-93, 83-04, 83-07, 83-47, 83-66, 83-67, 83-84, 84-18, 84-21, 84-25, 84-92, 84-128
 - Changes in job function ... 84-21
 - Compliance with wage structures ... 81-65, 82-41, 83-80, 84-33 (Supp.)
 - Contracting out ... 81-31, 81-45, 82-65, 84-27, 84-52, 84-53, 84-54, 84-91, 84-118
 - Employees outside unit ... 79-06, 79-13, 80-47, 80-76, 80-102, 80-121, 81-27, 81-33, 81-46, 81-121, 82-18, 82-29, 82-35, 82-65, 82-66, 82-83, 82-84, 82-116, 83-04, 83-11, 83-45, 83-60, 84-04, 84-21, 84-27, 84-30, 84-32, 84-93, 84-95, 84-110
 - During lay-off ... 78-03, 79-31, 82-84
 - Improper assignment within unit ... 84-92
 - Remedies ... 84-49

Employees within unit ... 81-66, 81-75, 82-69, 83-49, 83-80

-Location ... 79-01, 80-176

Working hours and shifts ... 78-12, 78-31, 78-44, 79-41, 79-49, 80-64, 81-77,
81-116, 82-09, 82-23, 82-60, 82-73, 83-02, 83-16, 83-65, 83-111, 83-115,
84-26, 84-45

-Definition of ... 84-85

Definition of work day defined ... 80-39

-Reduction of hours ... 79-41

-Transfer between shifts ... 84-85

Workmen's Compensation Act ... 82-57

PART 3
EMPLOYER & UNION INDEX
1978 - 1984

EMPLOYER & UNION INDEX

A. R. Hemming Building Systems Limited ... 81-28
Abbie J. Lane Memorial Hospital ... 78-31, 81-103
Aberdeen Hospital Commission ... 79-30
Acadia University ... 78-32, 80-151, 81-01, 83-80
Acadia University Faculty Association ... 81-01
Air Canada ... 84-69
Alder Point Construction Limited ... 81-48
Allen's Dairy Ltd. ... 84-104
All Saints Hospital ... 81-12
All-Wall Construction Ltd. ... 84-54
Allwood Products Limited ... 82-84
Alton Power Limited ... 80-85
Amalgamated Transit Union, Division 508 ... 79-29, 80-41, 81-53, 82-63,
82-109, 83-70
AMCA Engineering ... 83-48
Annapolis District School Board ... 84-59
Annapolis Regional Schools, Board of Trustees ... 81-97
Antigonish District School Board ... 84-118
Antigonish Town ... 78-40, 79-31
Arrow Building Corp. Limited ... 81-42
Associated Freezers of Canada Limited ... 81-85, 82-62, 84-73
Association of Commercial and Technical Employees, Local 1670 ... 80-13,
81-102, 84-87
Association of Postal Officials of Canada ... 84-77
Association of Supervisory Employees and Associates ... 80-135
Atlantic Bridge Co. Limited ... 81-45
Atlantic Concrete Limited ... 81-49
Atlantic Oil Workers, Local 1 ... 83-60, 84-18
Atlantic Provinces Special Education Authority ... 84-123
Atlantic Spring & Machine Shop ... 83-90
Atlantic Wholesalers Limited ... 78-33, 79-13
Atomic Energy of Canada ... 78-34, 78-35, 80-103, 80-135, 81-56, 84-46
Atomic Energy of Canada (Glace Bay Heavy Water Plant) ... 80-135
Atomic Energy of Canada Ltd., Glace Bay Heavy Water Plant, Chemical Division
... 84-25
Atomic Energy of Canada (Port Hawkesbury Water Plant) ... 82-83
B. G. Checo International Limited and Electric Dawcoelectric Limited ... 81-96
Bakery Confectionery and Tobacco Workers' Union, Local 446 ... 80-12, 80-98,
81-105, 82-33, 82-42, 82-89, 83-05, 83-105, 84-47, 84-51, 84-88, 84-114
Basic Wholesale Foods (Port Hawkesbury, N.S.) ... 82-115
Bedford Masonry Contractors Limited ... 80-50, 81-113
Bendix Home Systems Limited ... 80-49, 80-124, 80-174
Ben's Limited ... 80-98, 84-114
BIC Enterprises ... 84-110
Board of Governors of College of Cape Breton ... 78-46, 79-46, 80-69, 82-105
Board of Governors of Dalhousie College and University ... 81-82, 81-93,
82-69, 84-23
Board of Governors of the Technical University of Nova Scotia ... 84-81
Board of Management of the Cape Breton Hospital ... 80-138

Board of Police Commissioners, City of Sydney ... 83-86
Board of School Commissioners of City of Dartmouth ... 78-25
Board of School Commissioners of the Northside Victoria Amalgamated Board ...
81-89
Board of Trustees of the Annapolis Regional Schools ... 81-97
Bolands Limited ... 79-07, 80-12, 83-05, 84-51, 84-88
Bowater Mersey Paper Co. Limited ... 81-77, 83-88, 84-02, 84-124
Branch 18, Administrative Support and Nova Scotia Government Employees'
Association ... 78-46, 79-46
Bread, Cake, Biscuit, Crackers, Candy and Confectionery and Miscellaneous
Workers, Local 446 ... 78-08, 78-33, 79-07
Brewery and Soft Drink Workers, Local 361, Halifax, of the Canadian Union of
United Brewery, Flour, Cereal, Soft Drink and Distillery Workers ... 79-42
Brookfield Foods Limited ... 78-41, 81-105, 82-11, 83-49, 84-85
Brown & Root Limited ... 81-107
Buchanan Masonry Limited ... 82-06, 82-54
T. P. Calkin ... 81-46
Camp Hill Hospital ... 82-70, 82-100, 83-59, 84-86, 84-117
Canada Catering Company Limited ... 80-39
Canada Cement LeFarge ... 83-101
Canada Post Corp. ... 82-86, 82-87, 82-110, 83-30, 83-42, 83-98, 83-107,
84-05, 84-31, 84-77,
Canadian Air Line Employees Assoc. ... 82-76, 82-104, 83-02, 84-21
Canadian Air Line Flight Attendants Association ... 84-69
Canadian Brotherhood of Railway, Transport and General Workers ... 80-55,
82-30, 83-21, 83-28
Canadian Brotherhood of Railway, Transport and General Workers, Local 230 ...
84-36
Canadian Brotherhood of Railway, Transport and General Workers, Local 230 (b)
... 83-35
Canadian Brotherhood of Railway, Transport and General Workers, Local 503 ...
82-11
Canadian Brotherhood of Railway, Transport and General Workers, Local 504 ...
83-24
Canadian Brotherhood of Railway, Transport and General Workers, Local 506 ...
83-40, 84-58, 84-60
Canadian Brotherhood of Railway, Transport and General Workers, Local 507 ...
82-77, 83-06
Canadian Brotherhood of Railway, Transport and General Workers, Local 605 ...
80-177
Canadian Brotherhood of Railway, Transport and General Workers, Local 606 ...
79-52, 80-05, 80-39, 80-44, 80-123, 80-131, 80-137, 81-21, 81-55, 81-66,
81-81, 82-27, 83-58, 83-65, 83-97, 84-56
Canadian Brotherhood of Railway, Transport and General Workers, Local 607 ...
78-43, 83-20
Canadian Brotherhood of Railway, Transport and General Workers, Local 608-A
... 83-109, 84-65
Canadian Brotherhood of Railway, Transport and General Workers, Local 611 ...
81-118
Canadian Brotherhood of Railway, Transport and General Workers, Local 612 ...
79-47, 79-48, 79-49, 80-68, 80-108, 80-168, 80-178, 82-17, 83-99, 84-64

- Canadian Brotherhood of Railway, Transport and General Workers, Local 615 ...
83-09
- Canadian Brotherhood of Railway, Transport and General Workers, Local 619 ...
83-108
- Canadian Food and Allied Workers and the Retail Clerks' Union merged in 1980,
to form the United Food and Commercial Workers' Union
- Canadian Food and Allied Workers ... 79-26, 80-53
- Canadian Food and Allied Workers, Local P-268 ... 78-11, 78-61, 79-55, 80-43,
80-165
- Canadian Food and Allied Workers, Local 309 ... 78-09, 79-61, 80-155
- Canadian Merchant Service Guild ... 82-50
- Canadian Pacific Hotels ... 79-45
- Canadian Paperworkers' Union ... 82-24, 84-02
- Canadian Paperworkers' Union, Local 141 ... 81-77, 83-88, 84-124
- Canadian Paperworkers' Union, Local 434 ... 82-101, 82-102
- Canadian Paperworkers' Union, Local 440 ... 78-09, 78-10, 78-44, 80-72, 82-29,
82-23, 83-23
- Canadian Paperworkers' Union, Local 583 ... 82-12
- Canadian Paperworkers' Union, Local 972 ... 80-117, 84-26, 84-32
- Canadian Rock Salt Company Limited ... 78-05, 80-109, 80-115, 80-129, 80-175,
81-101, 82-09, 82-10, 84-52
- Canadian Seafood and Allied Workers' Union, Local 101 ... 78-14, 78-28, 79-11,
80-107, 80-133, 84-66
- Canadian Seafood and Allied Workers' Union, Local 112 ... 80-73
- Canadian Seafood and Allied Workers' Union, Local 118 ... 80-25
- Canadian Union of Postal Workers ... 82-86, 82-87, 82-110, 83-30, 83-42,
83-107, 84-31
- Canadian Union of Public Employees ... 80-132, 81-03, 81-78, 81-91, 82-28,
82-32, 82-113, 84-22
- Canadian Union of Public Employees, Local 79 ... 84-61
- Canadian Union of Public Employees, Local 143 ... 78-17, 83-102
- Canadian Union of Public Employees, Local 227 ... 82-18
- Canadian Union of Public Employees, Local 232 ... 82-90, 83-114
- Canadian Union of Public Employees, Local 741 ... 80-169
- Canadian Union of Public Employees, Local 753 ... 82-05
- Canadian Union of Public Employees, Local 758 ... 80-66, 83-86
- Canadian Union of Public Employees, Local 759 ... 80-47, 80-94, 81-31, 81-65,
81-74
- Canadian Union of Public Employees, Local 835 ... 80-10, 84-127
- Canadian Union of Public Employees, Local 867 ... 78-03, 84-80
- Canadian Union of Public Employees, Local 927 ... 83-79
- Canadian Union of Public Employees, Local 933 ... 78-15, 78-45, 79-54, 80-45,
81-44, 82-41, 84-57
- Canadian Union of Public Employees, Local 933 - Office and Clerical Staff of
the City of Sydney and the Office Clerical Staff of the Sydney Water
Commission ... 79-54, 82-41, 84-106
- Canadian Union of Public Employees, Local 955 ... 84-15, 84-16, 84-17, 84-128
- Canadian Union of Public Employees, Local 964 ... 80-38
- Canadian Union of Public Employees, Local 972 ... 78-22
- Canadian Union of Public Employees, Local 981 ... 84-45
- Canadian Union of Public Employees, Local 1027 ... 79-44
- Canadian Union of Public Employees, Local 1047 .. 79-57, 80-07, 80-29, 80-37,
80-86

Canadian Union of Public Employees, Local 1069 ... 82-71
 Canadian Union of Public Employees, Local 1116 ... 82-21
 Canadian Union of Public Employees, Local 1146 ... 78-24
 Canadian Union of Public Employees, Local 1183 ... 84-20
 Canadian Union of Public Employees, Local 1185 ... 80-158
 Canadian Union of Public Employees, Local 1187 ... 84-59
 Canadian Union of Public Employees, Local 1218 ... 80-114, 80-127, 80-128,
 83-68, 83-77
 Canadian Union of Public Employees, Local 1392 ... 79-60, 80-14, 80-61,
 80-102, 80-148, 80-149, 80-160, 80-176, 81-10, 81-43, 81-51, 82-99, 83-55,
 83-82
 Canadian Union of Public Employees, Local 1416 ... 80-97
 Canadian Union of Public Employees, Local 1441 ... 80-125
 Canadian Union of Public Employees, Local 1446 ... 79-28
 Canadian Union of Public Employees, Local 1524 ... 84-118
 Canadian Union of Public Employees, Local 1646 ... 79-30
 Canadian Union of Public Employees, Local 1711 ... 78-21, 79-23, 80-90
 Canadian Union of Public Employees, Local 1723 ... 80-91
 Canadian Union of Public Employees, Local 2031 ... 83-91, 84-102
 Canadian Union of Public Employees, Local 2046 ... 81-62, 83-113
 Canadian Union of Public Employees, Local 2336 ... 80-141, 84-82
 Canadian Union of Public Employees, Local 2391 ... 84-109
 Canadian Union of Public Employees, Local 2436 ... 83-61
 Canadian Union of Public Employees, Local 3010 ... 81-29, 82-94, 82-117, 83-33
 Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery
 Workers, Local 361 - Brewery and Soft Drink Workers ... 79-42, 80-15, 81-69,
 83-08
 Canso Seafoods Limited ... 81-118, 83-15, 83-16, 83-17, 83-18, 84-11, 84-131
 Cape Breton Construction Limited ... 78-04
 Cape Breton County ... 78-24, 78-28
 Cape Breton County Correctional Centre ... 78-24
 Cape Breton Development Corp. ... 81-62, 83-24, 83-113, 84-78
 Cape Breton District School Board ... 83-100, 83-114
 Cape Breton Hospital ... 81-114, 82-05
 Cape Breton Hospital Nurses Union ... 80-138
 Cape Breton Island District Council of Carpenters Trust Fund ... 82-16
 Cara Operation Limited ... 80-71, 80-166
 Carey Brothers Masonry Limited ... 80-122
 Celtic Construction Limited ... 80-04
 T. D. Chaisson Electric (1979) Limited ... 80-24
 Chappells Building Supplies Ltd. ... 84-36
 Chateau Halifax ... 78-23, 78-30, 84-89
 Chauffeurs, Warehousemen, Helpers and Miscellaneous Workers Credit Union,
 Local 927 ... 84-68
 B. G. Checo International Limited ... 81-96
 Children's Aid Society ... 81-29
 Children's Aid Society of Cape Breton ... 82-94, 82-117, 83-33
 City of Dartmouth ... 79-12, 80-118, 80-130, 81-06, 81-08, 81-47, 82-08,
 83-39, 83-89, 84-08, 84-48, 84-83, 84-115
 City of Dartmouth Board of School Commissioners ... 78-25
 City of Halifax ... 78-06, 78-13, 78-17, 78-18, 78-42, 79-04, 79-19, 80-56,
 80-70, 80-75, 80-120, 80-144, 81-09, 81-11, 81-15, 81-37, 81-52, 81-54,
 81-70, 81-111, 82-15, 82-58, 82-75, 82-81, 83-102, 84-13, 84-27, 84-28,
 84-43, 84-74, 84-76

City of Halifax, The Halifax Forum Commission, Directors of Point Pleasant
Part ... 80-34, 80-150
City of Sydney ... 78-15, 78-45, 79-54, 80-45, 80-47, 80-66, 80-94, 81-31,
81-44, 81-65, 81-74, 82-41, 84-57, 84-106
City of Sydney, Board of Police Commissioners ... 83-86
City of Toronto ... 84-61
Civil Service Arbitration Board ... 80-02
Civil Service Joint Council Act ... 80-02, 80-153
Clerical Staff of City of Sydney and the Office and Clerical Staff of the
Sydney Water Commission and Canadian Union of Public Employees, Local 933
... 79-54
Callavino - McCall Contractors Limited ... 82-20
Coca-Cola Limited ... 83-08
Colchester - East Hants Amalgamated School Board ... 79-57, 80-07, 80-29,
80-37, 80-86
Colchester Hospital ... 83-111
John D. Coleman, Masonry Limited ... 80-121
College of Cape Breton ... 78-46, 79-46, 80-69, 82-36, 82-105
Commercial & Technical Employees, Local 1670 ... 84-113
Community Hotel Limited ... 80-89
Comstock International Limited ... 79-41
Connors Bothers Limited ... 80-154, 82-78
Construction Association Management Labour Bureau ... 79-08, 79-09, 79-34,
79-35, 79-41, 79-56, 81-115, 82-39, 82-48, 82-49, 82-66, 82-92, 82-116,
83-07, 83-11, 83-25, 83-27, 84-95
Co-op Atlantic Building Supplies, Department - Sydney ... 81-25
Co-op Atlantic, Feed Plant ... 81-57
Corporation of the Town of Antigonish ... 78-40, 79-31
Correction Officers Association of Nova Scotia ... 80-01, 81-41, 83-26, 84-50,
84-112
Correction Officers Association of Nova Scotia, Local 5 ... 83-72
Crossley Karastan Carpet Mills Limited ... 79-47, 79-48, 79-49, 80-68, 80-108,
80-168, 80-178, 82-17, 83-28, 83-31, 83-99, 84-64
Cumberland County Correctional Centre ... 82-37
Cumberland County Municipality ... 82-37
Dalhousie College and University ... 79-05, 79-06, 79-43, 79-50, 80-14, 80-61,
80-160, 80-176, 81-10, 81-24, 81-43, 81-51, 82-69, 83-55, 83-81, 83-82,
84-33 & Supp., 84-126
Dalhousie Faculty Association ... 81-82, 81-93, 82-69, 84-23, 84-130
Dalhousie Staff Association ... 79-05, 79-22, 79-50, 81-24, 81-100, 82-74,
83-81, 84-133 & Supp., 84-126
Dalhousie University ... 79-22, 260, 80-78, 80-88, 80-102, 80-148, 80-149,
81-100, 82-03, 82-74, 82-99, 84-126, 84-130
Dartmouth Board of School Commissioners ... 79-37
Dartmouth City ... 79-12, 80-118, 80-130, 81-06, 81-08, 81-47, 82-08, 83-39,
83-89, 84-08, 84-48, 84-83
Dartmouth City Board of School Commissioners ... 78-25
Dartmouth District School ... 83-112
Dartmouth Firefighters Association, Local 1398 ... 79-12, 84-83
Dartmouth Firefighters Association, Local 1398, I.A.F.F. ... 81-47
Dartmouth General Hospital ... 80-05, 80-123, 81-21, 81-55, 82-30, 84-120
Dartmouth General Hospital & Community Health Centre ... 81-21, 81-81, 82-27,
83-58, 83-65, 83-74, 83-78, 83-97
Dartmouth Marine Slips ... 81-16, 84-91

Dartmouth Police Association, Local 101, (P.A.N.S.) ... 80-130, 84-08, 84-115
Dawso-Electric Limited ... 79-35, 80-63, 80-74, 81-40, 81-64, 81-96, 81-115,
82-48, 82-49
Deono Theatre Limited ... 80-60
Deuterium of Canada Limited ... 81-107
Digby General Hospital ... 79-44, 80-05
Digby Regional High School Board ... 80-158
Division 508 of the Amalgamated Transit Union ... 79-29
Dominion Stores Limited ... 82-112, 84-38
Dominion Textile Inc. ... 82-114
Domtar Chemicals Inc. ... 80-46
Dover Corporation (Canada) Limited ... 80-100
Dover Turnbull Corporation Canada Limited ... 80-32
E and R Construction Co. Limited ... 81-63
Easco Electric Limited ... 81-38, 84-92
East Cumberland Lodge ... 82-32, 84-109
Eastern Drug Services ... 82-33, 82-42
Eastern Provincial Airways Limited ... 82-76, 82-104, 83-02, 84-19, 84-21
Eastern Shore Memorial Hospital ... 84-07
Elcon Petroleum Maintenance Limited ... 82-16
Energy and Chemical Workers' Union, Local 44 ... 82-78
Energy and Chemical Workers' Union, Local 785 ... 84-25
Energy and Chemical Workers' Union, Local 822 ... 84-46
Energy and Chemical Workers' Union, Local 823 ... 80-115, 81-56, 81-101,
82-09, 82-10, 84-52
Energy and Chemical Workers' Union, Local 832, Port Hawkesbury ... 82-83
Erheat Inc. ... 84-84
Erheat Limited ... 80-27, 80-59, 80-156, 81-35, 81-36, 82-14, 83-76
Erheat Limited, Plant No. 4, Aircraft Division, Amherst ... 80-23, 80-30
F. A. Tucker (Atlantic) Limited ... 80-35
Fairview Electric Limited ... 80-48, 80-51, 80-101
Fairview Electric (1980) Limited ... 81-04
Fairview Villa Nursing Home ... 80-97
Ferguson Industries Limited ... 78-36, 81-17, 82-35
Franki Canada Limited ... 81-129
G. K. S. Masonry Limited ... 80-62
General Equipment Limited ... 82-45
General Home Systems Limited ... 80-31
General Workers of Sydney, C.L.C., Local 1509 ... 81-79
George L. Mitchell Contractors Limited ... 82-02
Glace Bay Community Hospital ... 82-95, 83-20
Glace Bay Heavy Water Plant ... 80-135
Glen Haven Manor Corporation ... 80-169
Glenview Health Care Services Limited ... 83-108
Governors of Acadia University ... 78-32, 80-151, 81-01, 83-80
Governors of Dalhousie College and University ... 79-05, 79-06, 79-50, 80-14,
80-61, 80-160, 80-176, 81-10, 81-24, 81-43, 81-51, 83-55, 83-81, 83-82
Governors of Dalhousie University ... 79-60
M. W. Graves & Co. ... 83-105
Guysborough Municipal School Board ... 82-21
H. B. M. Mechanics Limited ... 83-11
H. M. W. Industries ... 83-07

Halifax City ... 78-06, 78-13, 78-17, 78-18, 78-42, 79-04, 79-19, 80-56,
80-70, 80-75, 80-120, 80-144, 81-09, 81-11, 81-15, 81-37, 81-52, 81-54,
81-70, 81-111, 82-15, 82-58, 82-75, 82-81, 83-102, 84-13, 84-27, 84-43,
84-74, 84-76
Halifax Civic Employees Union, Local 143, C.U.P.E. ... 83-102
Halifax Civic Workers, Local Union ... 84-76, 84-108
Halifax Civic Workers' Union, Local 108 ... 78-13, 78-42, 79-19, 80-34, 80-56,
80-75, 80-120, 80-144, 80-150, 81-09, 81-52, 81-54, 81-70, 81-111, 82-58,
82-75, 84-13, 84-27, 84-28, 84-43, 84-116
Halifax County - Bedford District School Board ... 82-82, 83-53
Halifax - Dartmouth Regional Authority Employees' Association ... 79-15
Halifax Forum Commission ... 80-34, 80-150
Halifax Industries Limited ... 80-58, 80-80, 81-16, 81-94, 81-95, 82-43,
82-80, 83-87, 84-34
Halifax Industries Limited, Dartmouth Marine Slips ... 82-59, 82-60, 84-91
Halifax Infirmary ... 79-52, 80-44, 81-05, 81-61, 81-66, 81-108, 82-25, 82-52,
82-56, 83-09, 84-56
Halifax Longshoremen's Association, I.L.A., Local 268 ... 81-34
Halifax Longshoremen's Association, I.L.A., Local 269 ... 80-81
Halifax Municipal School Board ... 81-18
Halifax Patrolmens' Association, Local 110 ... 78-18
Halifax Police Patrolmens' Association, Local 110, P.A.N.S. ... 81-11
Halifax Police Officers and N.C.O.'s Association ... 84-74A
Halifax Transit Corporation ... 79-29, 80-41, 81-53
Hawker Industries Limited ... 80-11
Hawker Siddeley Canada Inc. ... 81-60, 81-106, 82-13, 82-61, 82-85, 82-98,
83-34, 83-62, 83-67, 83-106
Hawker Siddeley Industries Limited ... 79-58, 84-107
Hazel Hill Rest Home Corporation ... 80-91
Heckett-Division of Harsco Corp. ... 81-79
A. R. Hemming Systems Limited ... 81-28
Hermes Electronics Limited ... 79-51, 81-98, 81-116, 83-04
Highland View Regional Hospital ... 84-29
Hillcrest Manor Nursing Home Limited ... 83-109, 84-65
Hotel and Restaurant Employees and Bartenders International Union, Local 662
... 79-45, 82-01, 84-55
Hotel and Restaurant Employees and Bartenders International Union, Local 772
... 80-84
Hotel and Restaurant Employees and Bartenders Union ... 80-116
Hotel and Restaurant Employees and Bartenders Union, Local 662 ... 80-170,
80-171, 81-22, 81-30, 81-33, 83-10
Hotel and Restaurant Employees and Bartenders Union, Local 772 ... 80-89
Hotel, Motel, Restaurant, Bartenders, Construction Camps and Club Service
Employees, Local 622 ... 78-23, 78-30, 84-89
Hotel Nova Scotian ... 81-30, 81-33
Hotel, Restaurant and Bartenders Union, Local 622 ... 79-36
Huyck Canada Limited ... 82-93, 83-32
IMP Group Limited ... 84-67
IMP Aerospace Employees Association ... 84-67
Inducon Construction (Northern) Incorporation ... 80-21
Industrial Electrics Limited ... 83-45
Industrial Union of Marine and Shipbuilding Workers ... 80-58, 82-80

Industrial Union of Marine and Shipbuilding Workers, Local 1 ... 81-95
Industrial Union of Marine and Shipbuilding Workers, Local 13 ... 80-58,
81-16, 81-94, 82-59, 82-60, 84-34, 84-91
Industrial Union of Marine and Shipbuilding Workers of Canada ... 82-80
Industrial Union of Marine and Shipbuilding Workers of Canada, Local 15 ...
80-52, 83-90
Industrial Union of Marine and Shipbuilding Workers of Canada, Local 24 ...
81-45
International Alliance of Theatrical Stage Employees and Moving Picture
Machine Operators of the United States and Canada ... 80-60
International Association of Carpenters and Joiners, Local 1588 ... 82-55
International Association of Firefighters ... 84-83
International Association of Firefighters, Local 268 ... 78-06, 79-04, 80-70,
81-15, 81-37, 82-15, 82-81
International Association of Firefighters, Local 628 ... 78-06
International Association of Firefighters, Local 1398 ... 79-12, 82-08
International Association of Machinists & Aerospace Workers ... 84-19
International Brotherhood of Carpenters and Joiners, Local 83 and 1392 ...
81-63
International Brotherhood of Electrical Workers, Local 625 ... 81-96, 83-27,
83-45
International Brotherhood of Electrical Workers, Local 625 (T. D. Chaisson
Electric) ... 80-24
International Brotherhood of Electrical Workers, Local 625 (B. G. Checo
International Limited) ... 81-96
International Brotherhood of Electrical Workers, Local 625 (Dawco Electric)
... 79-35, 80-63, 80-74, 81-40, 81-64, 81-96, 81-115, 82-48, 82-49
International Brotherhood of Electrical Workers, Local 625 (Easco Electric)
... 81-38
International Brotherhood of Electrical Workers, Local 625 (Fairview Electric)
... 80-48, 80-51, 80-101, 81-04
International Brotherhood of Electrical Workers, Local 625 (L. Lewis Electric)
... 80-22
International Brotherhood of Electrical Workers, Local 625 (Mersey Electrical
& Contracting Ltd.) ... 84-53
International Brotherhood of Electrical Workers, Local 625 (Mersey Electrical
& Mechanical Contracting Limited) ... 82-116
International Brotherhood of Electrical Workers, Local 625 (George L. Mitchell
Contracting Limited) ... 82-02
International Brotherhood of Electrical Workers, Local 625 (N. S. Armature
Works Limited) ... 82-40
International Brotherhood of Electrical Workers, Local 625 (O'Malley Electric
Limited) ... 82-92, 83-29
International Brotherhood of Electrical Workers, Local 625 (Southern Electric
Ltd.) ... 84-49
International Brotherhood of Electrical Workers, Local 625 (R. G. Souther
Electric Limited) ... 81-117
International Brotherhood of Electrical Workers, Local 625 (Western Electric)
... 83-11, 83-25
International Brotherhood of Electrical Workers, Local 625 ... 84-49 Supp.,
84-92

International Brotherhood of Electrical Workers, Local 1030 ... 79-02, 80-40, 81-73, 81-109, 82-97, 82-107, 83-03, 83-14, 83-64, 83-92, 84-40
International Brotherhood of Electrical Workers, Local 1651 ... 79-51, 81-98, 81-116, 83-04
International Brotherhood of Electrical Workers, Local 1852 ... 80-134
International Brotherhood of Electrical Workers, Local 1928 ... 78-40, 79-20, 79-31, 79-38, 79-40, 80-16, 80-35, 80-54, 80-67, 80-79, 80-82, 80-93, 80-143, 80-145, 80-167, 81-58, 81-84, 81-104, 84-01, 84-122, 84-125
International Brotherhood of Railway, Transport and General Workers, Local 606 ... 79-52
International Longshoremen's Association, Local 1039 (Shipliners, of the port of St. John, N.B.) ... 82-38
International Longshoremen's Association, Local 1825 ... 82-07
International Moulders and Allied Workers' Union, Local 332 ... 80-64, 83-103
International Union of Bricklayers and Allied Craftsmen ... 80-09, 80-42, 80-50, 80-62, 80-121, 81-113, 82-06, 82-54
International Union of Elevator Constructors, Local 125 ... 80-32, 80-100, 82-45
International Union of Marine & Shipbuilding Workers, Local 1 ... 83-87
International Union of Marine & Shipbuilding Workers, Local 13 ... 82-43
International Union of Operating Engineers ... 83-75
International Union of Operating Engineers, Local 721 ... 78-04, 78-47, 80-85, 80-173, 81-129, 82-20, 84-101
International Union of Operating Engineers, Local 721B ... 81-130
International Union of Operating Engineers, Local 968 ... 78-31, 79-06, 79-43, 80-78, 80-88, 82-03
International Union of Operating Engineers, Local 968 and 968B ... 78-31
International Union of Operating Engineers, Local 968B ... 78-31, 78-32, 80-151, 83-80
International Union, United Automobile, Aerospace and Agricultural Implement Workers' of America, (U.A.W.), Local 720 ... 80-36, 80-95, 81-14, 82-31, 83-37, 83-96
Inter Supply Limited ... 83-19
Inverness County Municipal Housing Corporation ... 84-102
Inverness County Municipal Corp. ... 83-91
Inverness County Municipal School Board ... 80-132
Inverness District School Board ... 84-15, 84-16, 84-17, 84-128
Island Telephone Co. ... 83-03, 84-97, 84-98
Isle Royale Beverages, Ltd. ... 84-79
Ivaco, Inc. (Sivaco Maritimes) ... 84-71
I.W.K. Technical Employees Association ... 83-93
Izaak Walton Killam Hospital for Children ... 80-137, 83-93
J. D. MacLean ... 83-50
J. W. Rudderham Limited ... 80-134
J. W. Lindsay Enterprises Ltd. ... 84-04
John D. Coleman Masonry Limited ... 80-121
Joint Expenditure Board for the County of Cape Breton ... 78-24, 79-28
Joneljm Concrete Construction Limited ... 81-75, 82-39, 83-12, 83-44
Keddy's Plumbing and Heating and Halifax Local Union 56 ... 84-96
Kentville General Workers' Union, Local 301 ... 81-46
Kentville Hospital Association ... 79-21, 81-02
Kentville Hospital Employees' Association, Local 3 ... 79-21
Kentville Police Association, Local 107 ... 80-152, 82-22, 83-43, 84-37, 84-63

Kentville Town ... 80-152, 82-22, 83-43, 84-37, 84-63
Kenvic Transport Limited ... 82-89
Kings County ... 78-01, 78-02
Kingston Construction Ltd. ... 84-30
Komac Excavating Company ... 79-08
L. Lewis Electric Limited ... 80-22
Labourers' International Union, Local 615 ... 80-122, 81-90, 84-04, 84-110
Labourers' International Union, Local 1115 ... 79-08, 79-09, 79-25, 79-34,
79-56, 80-04, 80-21, 81-48, 81-75, 83-12, 83-50
Letter Carrier's Union of Canada ... 83-98, 84-05
J. W. Lindsay Enterprises Ltd. ... 84-04
Lord Nelson Hotel Limited ... 79-36, 80-116, 80-170, 80-171, 82-01, 83-10,
84-55
Lowney's Inc., Moirs Plant ... 84-47
Lunenburg Municipal School Board ... 80-125
Lunenburg Police Association, Police Association of Nova Scotia, Local 207 ...
79-03, 80-57
Lunenburg Town ... 79-03, 80-57
M. Sullivan and Sons Limited ... 79-56
MacDougall Construction Limited ... 82-108
MacGregor Bedding Inc. ... 84-103
MacIntyre Chevrolet, Oldsmobile Limited ... 83-40, 84-58, 84-60
J. D. MacLean ... 83-50
Maple Hill Manor ... 84-100, 84-105
Marine Office and Technical Employees' Union ... 80-80
Maritime Beverages Limited ... 78-19, 78-26, 78-37, 80-96, 81-86, 81-87,
81-92, 81-110, 82-67, 83-22, 83-63, 83-95, 84-68
Maritime Co-Operative Services ... 78-27
Maritime Employers' Association ... 80-81, 81-34, 82-07, 82-38
Maritime Steel and Foundries Limited ... 79-33, 79-59, 80-64, 83-103
Maritime Telegraph and Telephone Company Limited ... 79-02, 79-17, 80-40,
81-73, 81-109, 82-97, 82-107, 83-14, 83-64, 83-92, 84-40
Marks and Spencer Canada Incorporated (Peoples Division) ... 80-140
Masonite Canada Inc. ... 82-101, 82-102
G. K. S. Masonry Limited ... 80-62
H. B. M. Mechancis Limited ... 83-11
Mersey Electrical & Contracting Ltd. ... 84-53
Mersey Electrical and Mechanical Contracting Limited ... 82-116
Metropolitan Authority ... 84-50
Metropolitan Authority Employees' Association ... 80-08, 81-39
Metropolitan Authority of Halifax ... 80-01
Metropolitan Authority of Halifax, Dartmouth and the County of Halifax ...
79-15, 80-08, 81-39, 81-41, 83-26, 84-108, 84-112, 84-116
Metropolitan Stores (Glace Bay) ... 82-91
Metropolitan Transit Commission ... 82-63, 82-109
Metropolitan Transit Commission of Halifax, Dartmouth and the Municipality of
the County of Halifax ... 83-70
Millwrights & Machine Erectors, Local 1178 ... 83-07
Minas Basin Pulp and Paper Co. Limited ... 82-12
George L. Mitchell Contractors Limited ... 82-02
Modern Building Cleaning ... 80-141
Moosehead Breweries Limited ... 80-15, 81-69
Municipal Ready Mix Limited ... 79-25

Municipal School Board for the County of Inverness ... 80-132
Municipal School Board for the Municipality of the District of Lunenburg ...
80-125
Municipal School Board, Municipality of the County of Halifax ... 81-18
Municipal Spraying and Contracting Limited ... 80-173
Municipal Spraying and Contracting Limited and Rocky Lake Quarry Division of
Municipality of the County of Kings ... 78-01, 78-02
Municipality of the County of Cumberland ... 82-37
Municipality of the County of Halifax Municipal School Board ... 81-18
Municipality of the County of Kings Correction Officers Association, Local 125
of the Police Association of Nova Scotia ... 78-01, 78-02
Municipality of the District of Lunenburg ... 83-72
Murphy and Wharton (1978) Limited ... 82-66
M. W. Graves & Co. ... 83-105
NABET ... 82-79
National Harbours Board ... 81-20
National Sea Products Limited ... 78-14, 78-28, 79-11, 80-107, 80-133, 84-66
New Brunswick Broadcasting Co. Limited ... 82-79
New Dawn Guest Home ... 84-20
New Glasgow Police Association ... 83-01, 83-69, 84-99
New Glasgow Town ... 83-01, 83-69, 84-99
Newfoundland Fishermen & Food ... 84-131
New Waterford Town ... 81-78, 81-91
New Waterford Town, Board of Police Commissioners ... 82-90
New Waterford Town, Board of School Commissioners ... 81-83
North Sydney Marine Railway Co. ... 83-35
North Sydney Seafoods Limited ... 80-73
Northside General Hospital ... 78-43, 82-64, 83-21
Northside-Victoria Amalgamated Board of School Commissioners ... 81-89
Northside-Victoria District School Board ... 84-45
Northwest Construction Limited ... 78-47
Nova Scotia Armature Works Limited ... 82-40
Nova Scotia Association of Health Organizations (Dartmouth General Hospital)
... 80-123
Nova Scotia Building Supplies Limited ... 80-55
Nova Scotia Civil Service Commission ... 78-29, 79-18, 79-27, 80-83, 80-92,
80-106, 80-142, 80-146, 80-147, 80-153, 80-162, 80-163, 80-164, 81-80,
81-119, 81-120, 81-121, 81-122, 81-123, 81-124, 81-125, 81-126, 81-127,
81-128, 82-04, 82-26, 82-44, 82-51, 82-53, 82-68, 82-96, 82-111, 83-51,
83-56, 83-115, 83-116, 84-09, 84-10, 84-24, 84-41
Nova Scotia Civil Service (Housing Commission) ... 79-27
Nova Scotia Forest Industries ... 80-177, 82-24, 84-26, 84-32
Nova Scotia Government ... 78-20, 80-126
Nova Scotia Government Employees' Association, Branch 18 ... 78-46, 79-46
Nova Scotia Government Employees' Union ... 78-20, 78-29, 79-18, 79-27, 80-69,
80-83, 80-92, 80-105, 80-106, 80-126, 80-136, 80-142, 80-146, 80-147,
80-153, 80-162, 80-163, 80-164, 81-02, 81-80, 81-119, 81-120, 81-121,
81-122, 81-123, 81-124, 81-125, 81-126, 81-127, 81-128, 82-04, 82-26, 82-36,
82-44, 82-51, 82-53, 82-68, 82-96, 82-105, 82-111, 83-51, 83-56, 83-115,
83-116, 84-09, 84-10, 84-24, 84-41, 84-90, 84-121
Nova Scotia Government Employees Union, Branch 52 ... 84-93
Nova Scotia Housing Commission ... 79-27

Nova Scotia Liquor Commission ... 78-38, 80-13, 80-20, 81-76, 81-102, 83-84, 84-87, 84-113, 84-119, 84-121
Nova Scotia Liquor Commission Employees, Local 470 ... 78-38, 80-20, 81-76, 81-102, 83-84, 84-119
Nova Scotia Nurses' Union ... 81-12, 81-88, 81-103, 81-108, 81-114, 82-25, 82-52, 82-64, 82-88, 83-74, 83-78, 84-07, 84-100, 84-120
Nova Scotia Nurses' Union, Cape Breton Hospital ... 80-138
Nova Scotia Nurses' Union, Colchester Local ... 83-111
Nova Scotia Nurses' Union, Glace Bay Community Hospital Local ... 82-95
Nova Scotia Nurses' Union, Halifax Infirmary Local ... 81-61, 81-108, 82-25, 82-52, 82-56
Nova Scotia Nurses' Union, Highland View Regional Hospital Local ... 84-29
Nova Scotia Nurses' Union, Kentville Hospital Local ... 83-41
Nova Scotia Nurses' Union, Maple Hill Manor Local ... 84-100, 84-105
Nova Scotia Nurses' Union, Seaview Manor Home for Special Care Local ... 83-66
Nova Scotia Nurses' Union, Twin Oaks Memorial Hospital Local ... 82-88, 83-38
Nova Scotia Power Corporation ... 79-20, 79-38, 79-40, 80-16, 80-54, 80-67, 80-79, 80-82, 80-93, 80-143, 80-145, 80-167, 81-58, 81-84, 81-104, 82-77, 83-06, 84-01, 84-125
Nova Scotia Supreme Court, Appeal Division ... 81-107
Nova Scotia Supreme Court, Trial Division ... 81-108, 82-51, 82-52
Nova Scotia Teachers' Union ... 78-25, 81-18, 81-97, 82-82, 83-53, 83-100, 84-72, 84-123
Nova Scotia Teachers' Union, New Waterford Local ... 81-83
Nova Scotia Textiles Limited ... 79-10, 80-06, 81-68
Nova Scotia Union of Public Employees ... 80-118, 81-06, 81-08
Nova Scotia Union of Public Employees, Unit No. 1 ... 83-39, 83-89, 84-48
Nova Scotia Union of Public Employees, Unit No. 2 ... 79-37, 83-112
Nurses' Union of the Cape Breton Hospital ... 80-138
Oil, Chemical and Atomic Workers, Local 9-785 ... 78-35, 80-103
Oil, Chemical and Atomic Workers, Local 9-823 ... 78-05, 78-34, 80-109, 80-129, 80-175
Oil, Chemical and Atomic Workers', Local 9-856 ... 80-154
Oil, Chemical and Atomic Workers', Salt Workers, Local 9-824 ... 80-46
Oil, Chemical and Atomic Workers', Salt Workers, Local 9-832 ... 78-34
Oil, Chemical and Atomic Workers', Salt Workers, Local 9-875 ... 78-35
Oland Breweries Limited ... 79-42
Omega Construction Ltd. ... 84-42
O'Malley Electric Limited ... 82-92, 83-29
O'Toole's Transfer Limited ... 79-24, 79-39, 81-27
Painters and Allied Trades, Local 1945 ... 82-39
Pelton and Company Limited ... 80-119
Pictou County Municipal School Board ... 78-03, 82-28
Pictou District School Board ... 84-80
Piercy Supplies Ltd. ... 84-03
Pilkington Glass Limited ... 82-46
Pilkington Glass Limited (Halifax Glass Center) ... 82-34
Point Pleasant Park Directors ... 80-34, 80-150
Police Association of Nova Scotia ... 81-20
Police Association of Nova Scotia, Local 101 Dartmouth Police Association ... 80-130, 84-08, 84-114

Police Association of Nova Scotia, Local 103 - New Glasgow Police Association
... 83-01, 84-99
Police Association of Nova Scotia, Local 107 - Kentville Police Association
... 83-43, 84-63
Police Association of Nova Scotia, Local 110 Halifax Police Patrolmens'
Association ... 78-18, 81-11
Police Association of Nova Scotia, Local 125 - Municipality of the County of
Kings, Correction Officers Association ... 78-01, 78-02
Police Association of Nova Scotia, Local 207 - Lunenburg Police Association
... 79-03, 80-57
Post Publishing Company Limited ... 80-113
Producers Milk Products Limited ... 80-112, 80-161, 81-71, 82-19
Province of Nova Scotia by Civil Service Commission ... 78-29
Public Service Alliance of Canada ... 82-70, 82-100, 83-59, 84-86, 84-117
Public Service Commission of Halifax ... 82-18, 82-113
Queen's General Hospital ... 78-21, 79-23, 80-90
Queen's General Hospital Association, Inc. ... 81-19
R. G. Souther Electric Limited ... 81-177
Rahey's Supermarket ... 82-65, 83-104
Red and White Store of Port Hawkesbury ... 80-53
Reeves Modular Homes Limited ... 80-76, 80-157, 82-55
Retail Clerks' Union and the Canadian Food and Allied Worker's merged in 1980,
to form the United Food and Commercial Workers' Union
Retail Clerks' Union, Local 1973 ... 80-65, 80-87
Retail, Wholesale and Department Store Union, Local 596 ... 79-14, 79-16,
80-140, 81-25, 81-99, 82-65, 82-91, 83-71, 83-104, 84-79
Retail, Wholesale and Department Store Union, Local 1015 ... 79-13, 80-96,
81-85, 82-62, 82-67, 83-49, 83-95, 84-73, 84-85, 84-104
Richmond District School Board ... 82-71, 84-72
Richmond Fisheries Incorporated ... 79-61, 80-155, 81-07
Richmond Trawlers Limited ... 78-07
Rite-Way Builders ... 80-42
Riverport Seafood Limited ... 80-25
Robb Engineering ... 81-32, 82-57 83-48
Robb Engineering, Division of Dominion Bridge Company Limited ... 79-01,
80-03, 80-19
Rocky Lake Quarry Division ... 80-173
J. W. Rudderham Limited ... 80-134
Saga Canadian Management Services Limited ... 80-177
Saint Mary's University ... 79-32, 79-53, 84-111
Saint Mary's University Faculty Union ... 79-53, 84-111
Saint Michael's Shops of Canada ... 79-14, 79-16
Saint Rita Hospital ... 81-88
Scotian Crewing and Supply Services Limited ... 82-50
Scotian Gold Co-Operative Limited ... 78-08
Scott Maritimes Limited ... 80-72, 82-23, 82-29, 83-23
Scott Maritimes Pulp Limited ... 78-09, 78-10, 78-44
Seaboard G.M. Diesel Limited ... 81-130, 83-75
Seaport Contractors Limited ... 81-90
Seaview Manor Home for Special Care ... 83-66
Sheet Metal Workers' International Association, Local 409 ... 79-41
Shelburne District Municipal School Board ... 80-114, 80-127, 80-128, 83-68,
83-77

Sivaco Maritimes Limited ... 80-17, 80-99, 80-139, 84-44
Sivaco Maritimes Limited ... 84-71
Sobey's Stores Limited ... 80-65, 80-87, 82-47, 82-73, 83-85, 84-75
Sobey's Stores Limited, Port Hawkesbury ... 82-72
Southern Electric Ltd. ... 84-49
R. G. Souther Electric Limited ... 81-117
Springhill Police Association ... 83-73
Springhill Town ... 83-73
Standard Paving Maritime Limited ... 84-100
Stan's Electrical Limited ... 84-70
Stellarton Police Association, Local 305 ... 83-46
Stellarton Town ... 83-46
Stephens Building Supplies (1979) Limited ... 81-99, 83-71
Strait-Richmond Hospital ... 83-61
M. Sullivan and Sons Limited ... 79-56
Sunset Nursing Home ... 78-22
Sunset Residential Centre ... 83-79
Supreme Court of Nova Scotia, Appeal Division ... 81-107
Supreme Court of Nova Scotia, Trial Division ... 81-108, 82-51, 82-52
Sutton Development Limited ... 84-95
Sydney and District General Workers' Union, Local 1509 ... 78-27
Sydney City ... 78-15, 78-45, 79-54, 80-45, 80-47, 80-66, 80-94, 81-31, 81-44,
81-65, 81-74, 82-41, 84-57
Sydney City Board of Police Commissioners ... 83-86
Sydney Co-Op Society Limited ... 79-26
Sydney Engineering and Dry Dock Company Limited ... 80-52
Sydney Masonry Co. Limited ... 79-34
Sydney Steel Corporation ... 80-77, 80-172, 81-59, 83-47, 83-57, 84-12, 84-12
Supp., 84-94
Sydney Typographical Union, No. 460 ... 80-113
T. D. Chaisson Electric Limited ... 80-24
T. P. Calkin ... 81-46
Teamsters, Chauffeurs, Warehousemen, Local 92 ... 82-19
Teamsters, Chauffeurs, Warehousemen and Helpers, Local 927 ... 78-16, 78-19,
78-26, 78-37, 78-39, 79-24, 79-39, 80-26, 80-28, 80-33, 80-71, 80-110,
80-112, 80-161, 81-67, 81-71, 81-72, 81-112
Teamsters, Chauffeurs, Warehousemen, Helpers and Miscellaneous Workers, Local
927 ... 81-27, 81-49, 81-86, 81-87, 81-92, 82-34, 82-46, 82-103, 82-106,
83-19, 83-22, 83-63, 84-03, 84-06, 84-39
Teamsters Union, Local 927 ... 80-166
Technical University of Nova Scotia (Board of Governors) ... 84-81, 84-90
Technical University of Nova Scotia Faculty Association ... 84-81
Telephone Operators' Union ... 79-17
Telephone Plant Workers of Prince Edward Island, Local 1030, I.B.E.W. ...
84-97, 84-98
Telephone Traffic Operators, Local Union 1030 ... 79-02
Texaco Canada ... 83-60, 84-18
Toronto City ... 84-61
Town of Antigonish ... 78-40, 79-31
Town of Kentville ... 80-152, 82-22, 83-43, 84-37, 84-63
Town of Lunenburg ... 79-03, 80-57
Town of New Glasgow ... 83-01, 83-69, 84-99

Town of New Waterford ... 81-78, 81-91
Town of New Waterford, Board of Police Commissioners ... 82-90
Town of New Waterford, Board of School Commissioners ... 81-83
Town of Springhill ... 83-73
Town of Stellarton ... 83-46
Town of Trenton ... 83-36
Town of Truro ... 83-94, 84-22
Town of Westville ... 78-12
Town of Yarmouth ... 80-38
Trenton Police Association ... 83-36
Trenton Town ... 83-36
Trenton Works Division, Hawker Industries Limited ... 80-104, 80-159
Truro Police Association ... 83-94
Truro Town ... 83-94, 84-22
F. A. Tucker (Atlantic) Limited ... 80-35, 84-122
Twin Cities Co-Operative Dairy Limited ... 78-16, 78-39, 80-26, 80-28, 80-33,
80-110, 81-67, 81-72, 81-112, 82-103, 82-106, 84-06
Twin Cities Masonry (1972) Limited ... 80-09
Twin Oaks Memorial Hospital ... 82-88, 83-38
United Association of Journeymen and Apprentices of the Plumbing, Steamfitting
& Pipefitting Industry, Local 56 ... 81-26, 82-66
United Association of Journeymen and Apprentices of the Plumbing, Steamfitting
& Pipefitting Industry, Local 682 ... 83-54, 84-96
Automobile Workers of America, Local 720 ... 80-36, 80-95, 81-14,
82-31, 83-37, 83-96, 84-14, 84-35, 84-129
United Brotherhood of Carpenters and Joiners of America ... 80-31, 80-49
United Brotherhood of Carpenters and Joiners of America, Local 83 ... 80-119,
81-42, 83-13, 84-30, 84-42, 84-54
United Brotherhood of Carpenters and Joiners of America, Local 1392 ...
82-108, 84-95
United Brotherhood of Carpenters and Joiners of America, Local 1588 ... 83-44,
83-110
United Brotherhood of Carpenters and Joiners of America, Local 2165 ... 81-28
United Brotherhood of Carpenters and Joiners of America, Local 2179 ... 80-76,
80-157
United Brotherhood of Carpenters and Joiners of America, Local 2215 ...
80-124, 80-174
United Brotherhood of Carpenters and Joiners of America, Local 2284 ... 83-83
United Brotherhood of Carpenters and Joiners of America, Local 2325 ... 82-84
United Cement, Lime & Gypsum Workers International Union ... 83-101
United Food and Commercial Worker's, Local 309 ... 81-07
United Food and Commercial Worker's, Local 642 ... 81-13
United Food and Commercial Worker's, Local 910 ... 82-47, 82-115, 83-15,
83-16, 83-17, 83-18, 84-11
United Food and Commercial Worker's, Local P-1157 ... 81-57
United Food and Commercial Worker's, Local 1973 ... 82-72, 82-73, 82-112,
83-85, 84-38, 84-75
United Maritime Fishermen's Co-Operative Limited ... 80-43
United Mine Workers of America District 26, Local 4522 ... 84-78
United Steelworkers of America ... 79-59, 80-23, 83-67
United Steelworkers of America, Local 1064 ... 80-172, 83-57, 84-12 & Supp.,
84-94

Workers of America, Local 1231 ... 79-58, 80-11, 80-18, 80-104,
80-159, 81-60, 81-106, 82-13, 82-85, 82-98, 83-34, 84-107
United Steelworkers of America, Local 3172 ... 79-33
United Steelworkers of America, Local 4122 ... 79-01, 80-03, 80-19, 81-32,
82-57, 83-48
United Steelworkers of America, Local 4253 ... 82-61, 83-62, 83-106
United Steelworkers of America, Local 4700 ... 82-35
United Steelworkers of America, Local 4702 ... 78-36, 81-17
United Steelworkers of America, Local 4883 ... 80-30, 80-59, 81-35, 82-14,
83-76
United Steelworkers of America, Local 6516 ... 80-77, 81-59
United Steelworkers of America, Local 6537 ... 83-47
United Steelworkers of America, Local 6874 ... 80-27, 80-156, 84-84
United Steelworkers of America, Local 8176 ... 84-103
United Steelworkers of America, Local 8202 ... 81-36
United Steelworkers of America, Local 8679 ... 80-17, 80-99, 80-139, 84-44,
84-71,
United Textile Workers of America, Local 152 ... 82-114
United Textile Workers of America, Local 159 ... 79-10, 80-06, 81-68
United Textile Workers of America, Local 486 ... 82-93, 83-32
VS Services Limited (Food Management Services) ... 84-82
V. S. Services Limited ... 80-131, 83-52
Valley Health Services Association ... 83-41, 84-93
Van Rez Products Limited ... 83-83
Volvo Canada Limited ... 80-36, 80-95, 81-14, 82-31, 83-37, 83-96, 84-14,
84-35, 84-129,
W. Eric Whebby Limited ... 83-13
W. M. Walker Plumbing & Heating Limited ... 81-26
Waterford Co-Operative Supply Depot Limited ... 78-11, 79-55, 80-165
Western Electric ... 83-11, 83-25
Westville Police Association, Local 206 ... 78-12
Westville Town ... 78-12
W. Eric Whebby Limited ... 83-13
Wilson Family Restaurant Limited ... 80-84
W. M. Walker Plumbing & Heating Limited ... 81-26
Yarmouth Regional Hospital ... 80-10, 81-03, 84-127
Yarmouth Town ... 80-38
Zot Transportation Ltd. ... 84-39
Zutphen Brothers' Construction Limited ... 83-110

PART 4

BROWN & BEATTY TOPICAL CODE INDEX, 1978 - 1984



BROWN & BEATTY TOPICAL CODE INDEX

1 - ARBITRATION OF GRIEVANCES IN CONTEXT

- 1:0000 Introduction ... 78-25, 80-146
- 1:1000 The Legislative Framework ... 80-48, 80-50, 80-51, 80-119, 81-42, 81-63, 82-16
- 1:2000 The Nature of the Arbitral Process ... 79-23, 82-25, 84-48
- 1:3000 The Development of a Common Law of Arbitration ... 80-48, 80-50, 80-51, 80-119, 81-19, 81-38, 81-42, 81-63, 82-16, 84-19
- 1:4000 Concurrent Jurisdiction with Courts and Administrative Agencies ... 80-85
- 1:4100 Administrative Agencies ... 80-85, 84-61
- 1:5000 Judicial Review of Grievance Arbitration ... 81-51, 82-51, 82-52, 84-19
- 1:5100 Judicial Review Procedures ... 80-29, 80-77, 80-86, 80-146
- 1:5200 The Arbitration Process ... 78-15
- 1:5210 The Requirement of Impartiality ... 78-15, 79-32, 79-55, 81-23, 81-81, 81-82, 81-111
- 1:5300 Jurisdictional Error ... 80-29, 82-51
- 1:5400 Error of Law on the Face of the Award ... 80-86, 81-51, 81-107, 81-108
- 1:5410 Exception: Consensual Arbitration ... 80-29, 81-51
- 1:5600 Functus Officio ... 82-79, 83-89, 83-106

2 - JURISDICTION OF THE ARBITRATOR

- 2:0000 Introduction ... 79-12, 82-06
- 2:1000 Primary Sources of Jurisdiction ... 78-03
- 2:1100 The Statutory Requirement ... 79-16, 79-22, 79-24, 79-28, 79-29, 80-147, 81-27, 81-37, 82-70, 82-95, 83-113, 84-19, 84-49, 84-50, 84-82, 84-83
- 2:1200 The Collective Agreement ... 78-26, 78-29, 79-08, 79-12, 79-22, 79-53, 79-58, 80-24, 80-32, 80-70, 80-128, 80-164, 81-123, 82-08, 82-55, 82-92, 83-80, 83-85, 83-86, 84-33, 84-104, 84-121
- 2:1210 Individual Contracts of Employment ... 78-26, 78-29, 79-08, 79-53, 79-58, 80-24, 80-164, 82-69, 82-70, 83-24, 83-64, 84-72, 84-102
- 2:1300 The Submission of Arbitration ... 79-12, 79-22, 82-48, 82-51, 82-79, 83-14, 84-83
- 2:1400 Remedial Authority of the Arbitrator ... 80-116, 80-140, 82-22, 82-79, 83-51, 83-61, 83-89
- 2:1410 Damages ... 80-84, 80-116, 81-04, 82-22, 82-50, 82-79, 83-86, 84-56, 84-95, 84-110
- 2:1412 Duty to Mitigate ... 80-38, 82-22, 83-48
- 2:1423 Missed Overtime Opportunities ... 81-47, 82-79, 82-85
- 2:1424 Improper Work Assignments ... 81-48, 82-108, 84-42
- 2:1425 Improper Lay-offs ... 83-28, 84-12
- 2:1426 Union Security Claims ... 82-45, 82-108, 84-42, 84-49, 84-53
- 2:1427 Illegal Strikes ... 84-43
- 2:1430 Ordering Costs ... 80-09, 84-21, 84-95
- 2:1440 Rectification ... 79-22

- 2:1450 Compliance Orders ... 83-13
- 2:1470 Reinstatement and Substitution of Penalty ... 79-59, 82-96, 82-97, 82-99, 83-23, 83-108, 84-47, 84-56
- 2:1480 Restitution and Set-off ... 79-59
- 2:2100 Statutes ... 82-55, 83-113, 84-12, 84-28, 84-42, 84-81
- 2:2200 Promissory Estoppel ... 80-24, 80-59, 80-61, 81-65, 81-71, 82-58, 82-92, 83-01, 83-16, 83-19, 83-24, 83-54, 83-88, 84-07, 84-29, 84-39
- 2:2210 The Doctrine ... 80-59, 80-61, 80-74, 82-95, 83-18, 83-24, 83-81, 84-39, 84-72
- 2:2220 Applications of Promissory Estoppel ... 80-24, 80-59, 80-61, 81-97, 82-98, 83-13, 83-39, 83-81, 84-22, 84-29, 84-39, 84-88, 84-102
- 2:3000 Limits to the Arbitration of Grievances: Arbitrability ... 78-17, 78-25, 78-30, 78-32, 78-40, 78-45, 79-03, 79-12, 79-48, 79-50, 79-51, 79-54, 79-55, 81-80, 84-85
- 2:3100 Collective Agreement Limitations ... 78-45, 79-03, 79-12, 79-48, 79-51, 79-55, 82-42
- 2:3110 Parties ... 81-41, 82-04, 82-109
- 2:3120 Compliance with the Grievance Procedure ... 78-30, 78-32, 78-45, 79-12, 79-35, 79-48, 79-51, 80-57, 81-14, 82-85, 83-103
- 2:3122 The Form of the Grievance ... 78-32, 80-62, 80-82, 80-105, 81-21, 81-27, 81-49, 81-126, 83-14, 83-19, 83-42, 83-105
- 2:3124 Policy Grievances ... 78-32, 79-25, 80-23, 81-14, 81-21, 82-47, 82-88, 83-14, 83-28, 83-42, 83-67, 83-83, 83-111, 84-11, 84-36, 84-42, 84-62, 84-81
- 2:3126 Group Grievances ... 78-32, 82-71, 83-74, 83-105
- 2:3128 Time Limits ... 78-30, 78-32, 78-40, 79-34, 79-51, 79-55, 79-60, 80-19, 80-29, 80-52, 80-86, 80-94, 80-103, 80-124, 80-149, 81-12, 82-47, 82-71, 82-77, 82-88, 82-109, 83-13, 83-28, 83-31, 83-48, 83-81, 83-83, 83-109, 84-05, 84-71, 84-99, 84-126
- 2:3130 Waiver of Procedural Irregularities ... 79-34, 79-51, 79-55, 79-60, 80-19, 80-26, 80-103, 81-27, 82-29, 82-57, 82-71, 83-07, 83-19, 83-32, 84-63
- 2:3140 Relief Against Non-Compliance with the Grievance Procedure ... 78-45, 79-43, 79-57, 80-26, 80-103, 80-149, 80-168
- 2:3200 Limitations Apart from the Collective Agreement ... 79-50, 79-54, 81-19, 81-27, 82-57, 84-81
- 2:3210 Delay ... 80-124, 83-28, 83-31, 83-48, 83-93, 83-109
- 2:3220 Prior Award ... 79-31, 79-32, 81-31, 81-38, 82-58, 82-85, 82-92, 83-55, 84-78, 84-99
- 2:3230 Abandonment, Settlement and Withdrawal ... 78-17, 78-25, 79-21, 79-22, 79-31, 79-50, 79-54, 80-52, 83-17, 83-42, 83-51, 83-98, 84-54
- 2:4000 Exhaustion of Jurisdiction ... 83-89, 83-106

3 - THE ARBITRATION PROCESS

- 3:1100 Establishment of the Board of Arbitration ... 79-32, 79-55, 81-23
- 3:1200 Parties and Participants ... 83-18
- 3:1210 Notice of Parties Affected ... 80-19, 82-89
- 3:1400 Pre-Hearing Disclosure ... 84-50
- 3:1420 Production of Documents ... 84-50
- 3:2000 The Hearing: Preliminary Matters ... 79-03, 79-05

- 3:2100 Preliminary Objections ... 79-03, 79-05, 79-31, 79-32, 79-57, 80-32, 80-78, 80-157, 81-123, 82-06, 82-08, 82-57, 82-58, 82-70, 82-71, 82-77, 82-85, 83-14, 83-15, 83-19, 83-31, 83-48, 83-51, 83-66, 83-109, 84-19
- 3:2200 Change of Position ... 79-18, 81-103, 82-64, 82-70, 84-75
- 3:2300 Adjournments ... 80-22, 82-39, 84-21
- 3:2400 Onus or Burden of Proof ... 79-25, 79-40, 79-43, 82-56, 82-86, 83-04, 83-26, 83-50, 83-51, 83-55, 83-88, 83-104, 84-76
- 3:2410 Specific Applications of the Burden of Proof ... 79-19, 79-36, 81-30, 83-55
- 3:2411 Discharge and Discipline ... 84-10, 84-76, 84-77, 84-86, 84-125
- 3:2412 Damages, Back Pay and Mitigation ... 84-42, 84-43
- 3:2413 Skill and Ability ... 80-14, 81-25, 81-127, 81-128
- 3:2415 Layoff and Recall ... 80-148, 83-88, 84-12
- 3:2417 Distribution and Overtime ... 83-25
- 3:2500 The Standard of Proof ... 80-12, 80-16, 81-30, 84-10, 84-86, 84-87, 84-123, 84-125
- 3:2620 Splitting the Hearing Between Merits and Remedy ... 84-12, 84-43
- 3:3000 The Adducing of Evidence ... 80-101, 84-61, 84-127
- 3:3100 Real and Documentary Evidence ... 83-03, 84-125, 84-127
- 3:3200 Testimony Under Oath ... 84-31
- 3:3220 Examination of Witnesses ... 84-123
- 3:3226 Re-Examination ... 80-101
- 3:3300 Taking a View ... 84-123, 84-125
- 3:4000 Admissibility of Evidence ... 82-87, 84-75
- 3:4200 The Basic Principle: Relevance ... 80-176, 82-69, 84-86
- 3:4300 The Exclusionary Rules ... 84-86
- 3:4310 Hearsay ... 84-61
- 3:4332 Confessions ... 84-87
- 3:4340 Privilege ... 84-50
- 3:4400 Extrinsic Evidence ... 79-21, 79-44, 80-158, 82-71, 82-110, 83-27, 84-48, 84-83, 84-115
- 3:4410 Procedure for Receiving ... 81-115
- 3:4420 Negotiating History ... 80-54, 82-71, 83-54, 83-111, 84-83
- 3:4430 Past Practice ... 79-14, 80-04, 80-33, 80-58, 80-93, 80-96, 80-125, 81-71, 81-72, 81-73, 81-75, 81-77, 82-71, 82-83, 82-85, 83-16, 83-33, 83-59, 83-67, 83-87, 83-94, 83-95, 83-115, 84-07, 84-29, 84-30, 84-45, 84-64, 84-80, 84-82, 84-85, 84-106, 84-112, 84-115
- 3:4500 Character Evidence ... 84-123
- 3:4600 Opinion Evidence ... 84-123, 84-125
- 3:5000 The Decision Making Process ... 83-106
- 3:5100 Weighing the Evidence ... 80-18, 80-79, 84-28, 84-31, 84-61, 84-111, 84-123
- 3:5200 Making the Award ... 83-106

4 - THE COLLECTIVE AGREEMENT

- 4:0000 Introduction ... 82-39
- 4:1000 Form and Content of the Collective Agreement ... 78-04, 78-25, 79-07, 79-09, 79-31, 79-57, 80-157, 80-158
- 4:1100 Essentials of the Collective Agreement ... 81-71, 82-66, 84-39

- 4:1200 Ancillary Documents ... 79-42, 80-30, 80-70, 80-164, 80-176, 82-45, 83-02, 84-32, 84-39
- 4:1300 Amendments ... 78-25, 83-45, 84-39
- 4:1400 Pension, Insurance and Welfare Plans ... 78-04, 78-25, 79-09, 82-45, 82-54, 82-57, 82-111, 83-13, 83-27, 83-91, 84-96
- 4:1500 Company Rules ... 79-04, 79-07, 80-05, 80-130, 80-133, 80-138, 80-169, 81-98, 82-17, 82-21, 82-25, 82-44, 82-52, 82-102, 83-23, 83-75, 83-77, 83-102, 84-97, 84-98, 84-113, 84-120
- 4:1610 Retroactivity ... 80-13, 80-96, 80-122, 82-12, 82-70, 82-88, 83-45, 84-104
- 4:1620 Term and Termination ... 78-25, 80-60, 80-173, 82-70, 82-112, 82-115, 83-50, 84-39
- 4:2000 Interpretation of Collective Agreements ... 78-16, 78-39, 78-46, 79-14, 79-16, 79-17, 79-20, 79-35, 79-42, 79-44, 79-53, 80-04, 80-126, 80-128, 81-90, 81-93, 82-20, 82-105, 82-116, 83-110, 84-52, 84-73, 84-121
- 4:2100 The Object of Construction: The Intention of the Parties ... 78-39, 78-46, 79-35, 79-42, 80-04, 80-15, 80-17, 80-35, 80-39, 80-41, 80-45, 80-54, 80-81, 80-126, 80-128, 80-134, 80-137, 80-139, 80-140, 80-150, 80-154, 80-156, 81-03, 81-11, 81-15, 81-17, 81-18, 81-19, 81-34, 81-40, 81-44, 81-76, 82-12, 82-13, 82-27, 82-29, 82-67, 82-76, 82-94, 82-110, 82-113, 83-03, 83-11, 83-12, 83-14, 83-16, 83-21, 83-27, 83-29, 83-33, 83-36, 83-39, 83-54, 83-59, 83-61, 83-63, 83-65, 83-68, 83-78, 83-86, 83-87, 83-92, 83-97, 83-110, 83-115, 84-01, 84-04, 84-08, 84-11, 84-18, 84-22, 84-29, 84-34, 84-59, 84-63, 84-83, 84-103, 84-105, 84-112, 84-117, 84-122, 84-124, 84-131
- 4:2200 Aids to the Interpretation of Collective Agreements ... 84-131
- 4:2210 Dictionaries ... 83-11, 83-44, 84-80, 84-105, 84-124
- 4:2220 Prior Arbitration Awards and Judicial Decisions ... 82-86, 83-21
- 4:2230 Statutes .. 78-16, 84-63, 84-78
- 4:2240 Prior Agreements ... 83-87, 84-124
- 4:2250 Extrinsive Evidence ... 83-45, 84-30
- 4:2300 The Collective Bargaining Context ... 79-25, 79-35, 79-42, 82-23, 82-38, 82-82, 82-93, 83-20, 83-61, 83-84, 83-116, 84-59, 84-88, 84-101, 84-122, 84-131
- 4:2310 Management Rights ... 84-67, 84-97, 84-98
- 4:2320 Management's Duty to Act Fairly ... 84-101

5 - ORGANIZATION AND DIRECTION OF THE WORKPLACE

- 5:0000 Introduction ... 78-31, 79-25, 80-06, 80-46, 80-65, 80-83, 80-176, 81-13, 81-29, 82-38, 82-52, 82-102, 83-60, 84-122
- 5:1000 Assignment of Work Outside the Bargaining Unit ... 78-03, 79-13, 84-70, 84-78, 84-131
- 5:1100 Defining the Bargaining Unit ... 79-13, 82-56, 82-69, 84-112
- 5:1120 Unit Definition in Terms of Employees ... 78-01, 79-13, 82-36, 84-23, 84-58
- 5:1122 Employee Defined ... 79-13, 80-127, 82-65, 84-27
- 5:1124 Temporary, Casual and Part-Time Employees ... 79-13, 81-83, 82-36, 82-69, 83-46, 83-49, 83-50, 83-73, 83-91, 84-31, 84-51, 84-65, 84-93, 84-104, 84-105, 84-112

- 5:1126 Foremen and Supervisors ... 80-21, 81-26, 83-66, 84-23
- 5:1200 Bargaining Unit Work ... 79-13, 79-38, 80-09, 80-21, 80-47, 80-102, 80-113, 81-46, 81-48
- 5:1300 Assignment of Bargaining Unit Work to Non-Employees: Contracting Out ... 80-127, 81-31, 81-45, 82-58, 82-65, 82-83, 83-11, 83-45, 83-50, 84-27, 84-52, 84-53, 84-54, 84-91, 84-118
- 5:1400 Assignment of Bargaining Unit Work to Non-Unit Employees ... 79-06, 79-13, 80-47, 80-71, 80-76, 80-102, 80-121, 81-27, 81-33, 81-45, 81-46, 81-121, 82-18, 82-29, 82-35, 82-66, 82-84, 82-116, 83-04, 83-60, 84-04, 84-21, 84-27, 84-30, 84-32, 84-93, 84-95, 84-110
- 5:1500 Remedies for Improper Work Assignments ... 81-48, 82-35, 84-49, 84-110
- 5:2000 Distribution of Work Within the Bargaining Unit ... 78-35, 79-01, 79-06, 79-30, 80-75, 80-114, 81-66, 81-75, 82-117, 83-47, 83-67, 83-80, 84-18, 84-21, 84-25, 84-85, 84-92, 84-128
- 5:2200 Express Prohibitions in the Agreement ... 80-75, 82-41, 82-73, 83-01, 83-03, 83-12, 83-76, 83-111, 84-02, 84-46, 84-48, 84-57, 84-115
- 5:2300 The Requirement of Bona Fides ... 79-06, 81-29, 82-29, 82-76, 82-82, 82-94, 83-47, 83-84, 83-88, 84-02, 84-21, 84-41, 84-46, 84-88
- 5:2400 Compliance with Wage Structure ... 81-65, 82-41, 83-80, 84-33, 84-131
- 5:2410 Changes in Job Function ... 80-46, 82-31, 82-69, 83-49, 83-80, 84-21
- 5:2420 Criteria: Equal Work or Equal Skill ... 81-66, 81-100, 81-104, 83-08, 83-38, 84-12
- 5:2440 Revision of Classification and Rate ... 81-104, 82-41, 82-72, 82-117, 84-02, 84-48, 84-58, 84-67
- 5:2500 Procedural Requirements ... 79-01, 80-176, 82-81, 82-93, 83-36, 84-21
- 5:2510 Vacancies ... 79-01, 80-19, 80-34, 80-98, 80-143, 80-176, 81-49, 81-88, 82-81, 83-20, 83-42, 83-49, 84-57, 84-128
- 5:2520 Job Posting 78-35, 79-01, 79-15, 80-143, 80-176, 81-29, 82-24, 83-20, 83-31, 83-100, 84-22, 84-41, 84-46, 84-118
- 5:3000 Scheduling Work ... 78-09, 78-12, 78-31, 78-34, 78-44, 79-41, 79-49, 82-09, 84-85
- 5:3100 Work Hours and Shifts ... 78-12, 78-31, 78-44, 79-49, 80-64, 81-77, 81-116, 82-18, 82-23, 82-60, 83-02, 83-16, 83-65, 83-111, 83-115, 84-26, 84-45, 84-85
- 5:3200 Overtime ... 78-09, 78-12, 78-31, 78-34, 78-44, 79-49, 81-77, 81-129, 81-130, 84-26, 84-31, 84-104
- 5:3210 Voluntary or Compulsory ... 78-34, 79-49, 80-151, 82-58, 83-107, 84-104
- 5:3220 Proprietary Rights to Overtime Assignments ... 78-44, 79-40, 79-49, 80-95, 80-159, 80-177, 81-47, 81-112, 81-121, 82-18, 82-29, 82-83, 83-25, 83-99, 84-51, 84-91
- 5:3222 Persons Normally Performing the Work ... 79-49, 80-58, 81-17, 81-112, 82-80, 84-32
- 5:3224 Allocation of Overtime Within the Group ... 78-09, 78-44, 79-49, 80-159, 82-58, 82-59, 82-101, 83-107, 84-64
- 5:3230 Miscellaneous Restrictions ... 80-159
- 5:3240 Remedies ... 79-49, 81-47, 82-80, 84-51, 84-91

6 - SENIORITY

- 6:0000 Introduction ... 78-10, 79-17, 79-58, 81-76
- 6:1000 Acquisition and Termination ... 78-10, 78-30, 84-80
- 6:1100 Generally ... 80-132, 83-48

- 6:1110 Non-Working Periods ... 83-64, 84-84
- 6:1120 Non-Unit Employment ... 78-01, 83-58, 83-85, 83-114
- 6:1130 Super Seniority ... 80-74, 80-40
- 6:1200 Duration and Loss of Seniority ... 78-26, 78-30, 82-86, 83-71
- 6:2000 Applications of Seniority ... 78-10, 78-18, 78-19, 78-26, 78-27,
79-15, 79-17, 79-28, 79-29, 79-31, 79-37, 79-38, 79-51, 80-01,
80-69, 81-57, 81-80, 81-91, 81-123, 82-07, 82-90, 82-102, 82-103,
83-18, 84-22, 84-80, 84-114, 84-128
- 6:2100 Promotion, Demotion, Transfer ... 78-06, 78-18, 78-27, 79-15, 79-17,
79-20, 79-28, 79-29, 79-30, 79-37, 80-01, 80-10, 80-69, 80-98,
81-95, 82-68, 82-76, 82-93, 82-94, 83-03, 83-26, 83-57, 83-76,
83-84, 83-92, 83-100, 83-114, 84-25, 84-74, 84-114, 84-128
- 6:2200 Lay-off ... 78-10, 78-19, 78-26, 80-100, 82-07, 82-64, 82-102, 82-103,
82-115, 83-18, 83-29, 83-47, 83-49, 83-64, 83-83, 84-25, 84-100,
84-107, 84-124
- 6:2210 Reduction of Hours ... 79-41, 80-100, 84-100
- 6:2220 Lay-off for Less than One Shift ... 80-100, 80-108, 81-46
- 6:2300 Promotion and Lay-off Procedures ... 78-06, 79-51, 81-123
- 6:2310 Job Posting ... 78-06, 81-76, 81-122, 81-125, 81-126, 81-127, 81-128,
82-51, 83-20, 84-92
- 6:2320 Notice of Lay-off ... 79-19, 82-62, 83-28, 84-78
- 6:2330 Bumping ... 78-26, 80-72, 80-145, 80-163, 80-167, 81-57, 82-13, 82-14,
82-102, 82-103, 82-115, 83-18, 83-47, 83-62, 83-101, 83-106, 84-60,
84-107, 84-128
- 6:2340 Bumping Upwards ... 80-26, 80-72, 80-167, 83-62, 84-25
- 6:2350 Recall of Persons on Lay-off ... 78-10, 79-51, 84-71
- 6:2352 Status of Persons on Lay-Off ... 83-34, 84-73
- 6:2354 Rights to Recall ... 79-31, 80-69, 82-84, 83-31, 83-76, 83-103, 84-25,
84-32, 84-33, 84-36, 84-52, 84-107
- 6:3000 The Skill and Ability Requirement ... 78-06, 78-10, 78-18, 78-27,
79-15, 79-51, 80-10, 80-14, 80-66, 80-97, 80-129, 81-13, 81-35,
81-122, 82-61, 82-68, 83-25, 83-62, 83-103, 83-106, 84-22, 84-33,
84-107
- 6:3100 The Scope of Arbitral Review ... 78-18, 79-15, 79-51, 80-06, 80-10,
80-66, 80-97, 80-129, 81-122, 81-125, 81-126, 81-127, 80-128, 82-61,
82-68, 83-36, 83-58, 83-79, 83-83, 84-15, 84-16, 84-22, 84-41,
84-62, 84-74, 84-107, 84-128
- 6:3200 Proof of Ability ... 78-18, 78-27, 79-51, 80-10, 80-14, 80-106, 81-25,
84-12, 84-33, 84-107
- 6:3210 Senior Employee with the Required Ability ... 78-10, 78-18, 79-51,
80-59, 80-69, 80-72, 80-145, 80-163, 80-167, 81-25, 81-35, 81-39,
82-07, 82-90, 83-31, 83-36, 84-12, 84-17, 84-60, 84-80, 84-107
- 6:3220 Senior Employee if Relatively Equal ... 80-14, 80-106, 80-160, 81-125,
81-126, 81-127, 81-128, 83-73, 83-79, 84-41
- 6:3230 Trial, Training and Familiarization Periods ... 80-14, 80-145, 80-160,
80-163, 80-167, 81-25, 81-39, 82-61, 83-10, 83-47, 83-74, 83-78,
83-101, 84-62
- 6:3300 Ability and Qualifications Criteria ... 78-18, 79-15, 80-66, 80-67,
81-122, 83-79, 83-100, 83-106, 84-12, 84-15, 84-16, 84-17, 84-41,
84-106, 84-107, 84-114, 84-118
- 6:3310 Disciplinary Records ... 78-27
- 6:3320 Education ... 80-72
- 6:3330 Aptitude ... 83-79

- 6:3340 Examination and Tests ... 78-06, 80-66, 83-03, 83-100, 84-62, 84-106,
84-107
6:3360 Physical Capabilities ... 79-37, 79-51, 80-14, 80-63, 81-39
6:4100 Promotions ... 82-79, 84-74

7 - DISCIPLINE

- 7:0000 Introduction ... 78-36, 82-33, 82-58
7:1100 At Common Law ... 80-02, 81-99
7:1200 Where the Agreement is Silent ... 79-18, 79-19, 79-27, 79-36, 79-59,
80-03, 80-08, 80-11, 81-01, 83-37, 84-104, 84-111
7:1300 Collective Agreement Limitations ... 82-42, 83-77
7:2000 Discipline and Discharge Procedures ... 78-05, 79-11, 83-17
7:2100 Proceedings Prior to Arbitration ... 79-32, 80-40, 81-14, 82-30,
82-42, 82-95, 83-32, 84-10, 84-40, 84-129
7:2200 Alteration of Grounds ... 79-18, 79-32, 82-33, 84-75, 84-86
7:2300 Burden of Proof ... 79-11, 79-19, 79-36, 81-30, 81-43, 81-124, 83-30,
84-10, 84-86, 84-87, 84-113
7:2500 Standard of Proof: Criminal Misconduct ... 78-05, 80-55, 80-131,
80-165, 80-166, 82-106, 84-10, 84-38, 84-77, 84-79, 84-86, 84-87
7:3000 Grounds of Discipline ... 78-05, 78-07, 78-11, 78-20, 78-23, 78-24,
78-28, 78-33, 78-36, 78-37, 78-38, 78-39, 78-41, 78-42, 79-02,
79-07, 79-10, 79-11, 79-45, 79-46
7:3010 Off-Duty Behaviour ... 78-24, 80-118
7:3100 Attendance at Work ... 79-60, 80-53, 80-117, 80-120, 80-138, 80-161,
80-172, 81-10, 81-114, 82-96, 83-09, 84-75
7:3110 Notification of Absence ... 80-05, 80-07, 80-31, 80-120, 80-138,
80-161, 81-69, 82-17, 83-32, 83-53, 84-35, 84-44
7:3112 Reasonable Explanation of Absence ... 80-117, 80-161, 80-172, 80-178,
83-09, 83-32
7:3114 Unauthorized Absence: Abrogation of Seniority Rights ... 84-71
7:3120 Leave of Absence ... 78-42, 80-38, 80-109, 80-115, 84-13
7:3130 Leave Work Without Permission ... 78-11, 78-28, 79-27, 80-07, 80-36,
80-79, 80-89, 80-144, 80-151, 81-06, 81-09, 81-10, 81-30, 81-52,
81-54, 81-70, 82-17, 84-68, 84-86, 84-94
7:3140 Lateness ... 78-07, 78-42, 79-24, 80-178, 81-85, 83-98, 84-03, 84-24,
84-35, 84-55, 84-90
7:3200 Employee Disability ... 80-136, 80-162, 81-69, 81-106, 82-114, 83-06,
83-09, 83-71, 83-82, 84-05, 84-40, 84-125
7:3210 Innocent Absenteeism ... 79-02, 80-15, 80-136, 80-155, 81-106, 82-05,
82-63, 83-06, 83-82, 84-05, 84-13, 84-75, 84-76, 84-125
7:3220 Inability to Discharge Employment Obligations ... 79-02, 79-33,
82-114, 83-09, 83-71, 83-82, 84-44, 84-76
7:3230 Medical Examinations ... 79-04, 80-123, 82-25, 82-52, 84-119
7:3240 Employer Responses Other Than Termination ... 79-02, 80-136, 83-09,
83-26, 84-13, 84-40, 84-125
7:3250 Onus ... 82-05, 82-63, 83-81, 84-40, 84-125
7:3300 Dishonesty ... 78-37, 80-91, 80-118, 82-104, 84-77
7:3310 Theft ... 78-05, 78-37, 80-55, 80-131, 80-165, 80-166, 81-62, 81-79,
82-99, 82-106, 82-109, 83-05, 83-23, 83-52, 83-55, 83-71, 83-72,
83-108, 84-77, 84-86, 84-87, 84-113

- 7:3312 Obligation of Explanation ... 80-12, 80-118, 83-06, 83-23, 83-75, 84-113
- 7:3314 Penalty ... 78-05, 78-37, 80-131, 81-62, 83-05, 83-23, 83-72, 83-75, 84-113
- 7:3320 Falsification of Employment Records ... 80-05, 80-91, 83-75
- 7:3322 Production Records ... 80-142, 82-46
- 7:3330 Conflict of Interest ... 80-142, 82-46
- 7:3410 Sabotage ... 80-112, 83-22
- 7:3422 Criminal Convictions ... 78-24
- 7:3430 Fighting, Assault ... 80-16, 80-68, 82-40, 82-107, 83-19, 83-40, 83-96, 84-10, 84-47, 84-111
- 7:3500 Work Performance ... 78-21, 79-07, 79-11, 80-44, 82-32, 82-87
- 7:3510 Incompetence ... 79-11, 79-26, 79-33, 80-53, 80-89, 80-168, 80-171, 81-20, 81-28, 81-67, 81-119, 81-124, 83-15, 83-22, 83-30, 83-90, 84-40, 84-55, 84-79
- 7:3520 Carelessness ... 78-20, 80-112, 81-08, 82-37, 83-37, 83-56, 84-55, 84-69, 84-86, 84-108, 84-109, 84-113
- 7:3530 Unsuitability ... 78-21, 79-11, 79-33, 83-15, 84-33, 84-79
- 7:3540 Penalties for Work Related Misconduct ... 78-20, 78-42, 79-02, 79-11
- 7:3542 Warnings, Suspensions, Discharge ... 78-07, 78-20, 78-24, 78-33, 78-42, 79-02, 79-11, 79-46, 80-02, 80-44, 81-124, 82-33, 83-15, 83-37, 83-53, 83-77, 83-112, 83-116, 84-03, 84-69, 84-79, 84-89, 84-108, 84-127
- 7:3544 Disciplinary Demotion ... 79-20, 83-01, 84-44, 84-61, 84-113
- 7:3546 Non-Disciplinary Demotion ... 78-21, 83-26, 83-57, 83-90
- 7:3550 Personal Appearance ... 78-21, 84-79
- 7:3560 Alcoholic Beverages or Drugs ... 78-36, 79-07, 79-11, 79-27, 80-02, 80-43, 80-78, 80-92, 80-107, 82-17, 82-96, 83-06, 83-35, 83-98, 84-05, 84-38, 84-76
- 7:3570 Sleeping on the Job ... 80-18, 81-22, 84-20
- 7:3580 Failure to Co-operate ... 79-18, 83-22, 84-86, 84-123
- 7:3600 Insubordination ... 78-11, 78-23, 78-33, 78-36, 78-37, 78-38, 78-41, 79-10, 79-45, 79-46, 80-39, 80-53, 80-169, 82-75, 82-78, 82-87, 83-96, 84-06
- 7:3610 Refusal to Follow Instructions ... 78-23, 78-36, 78-38, 79-19, 79-23, 79-26, 79-33, 79-45, 80-11, 80-28, 80-36, 80-39, 80-65, 80-83, 80-84, 80-89, 80-93, 80-171, 81-07, 81-16, 81-36, 81-68, 81-84, 81-86, 81-91, 81-94, 81-103, 81-120, 82-01, 82-28, 82-34, 83-10, 83-22, 83-53, 83-70, 83-75, 83-77, 83-102, 84-35, 84-56, 84-66, 84-89, 84-127
- 7:3612 Essential Ingredients ... 79-19, 79-23, 79-33, 80-11, 81-07, 81-16, 81-36, 83-77
- 7:3620 Exceptions ... 83-09
- 7:3621 Health and Safety ... 80-11, 81-07, 81-84, 83-09, 83-60, 83-102
- 7:3623 Union Officials ... 82-100
- 7:3626 Reasonable Personal Excuse ... 78-11, 79-33, 83-102
- 7:3630 Refusal to Work Overtime ... 78-39, 78-41, 79-10, 81-105, 82-58
- 7:3634 Compulsory Overtime ... 79-10, 80-151, 84-116
- 7:3636 Reasonable Personal Excuse ... 80-64, 84-116
- 7:3640 Refusal to Cross Picket Line ... 79-43, 79-46
- 7:3660 Insolent Unco-operative Behaviour, Obscene Language ... 78-33, 78-37, 78-38, 80-03, 80-20, 82-91, 83-19, 83-40, 83-96, 84-06, 84-55, 84-86
- 7:4000 Disciplinary Penalties ... 78-28, 78-38, 78-39, 78-41, 81-08, 81-58, 83-102, 84-109, 84-111
- 7:4100 Scope of Review ... 80-31, 80-36, 80-172, 81-10, 82-40, 83-09, 83-40, 83-52, 84-108, 84-123

- 7:4200 Disciplinary Sanctions ... 84-116
- 7:4210 The Nature of Disciplinary Sanctions ... 79-43, 80-02, 83-56, 83-93, 84-14
- 7:4220 Monetary Penalties ... 80-96, 81-96, 84-101
- 7:4240 Multiple Penalties ... 81-08, 84-61
- 7:4250 Demotion ... 81-91
- 7:4300 The Reasonableness of the Penalty ... 78-20, 78-23, 78-28, 78-39, 78-41, 79-46, 81-120, 82-19, 82-33, 82-46, 82-75, 82-78, 83-90, 83-108, 83-112, 83-116, 84-13, 84-66, 84-68, 84-94, 84-111
- 7:4310 The Doctrine of the Culminating Incident ... 78-23, 80-07, 80-28, 80-84, 80-89, 80-99, 81-22, 81-67, 81-111, 82-19, 82-33, 82-91, 83-10, 83-70, 83-35, 83-96, 84-06, 84-13, 84-14, 84-24, 84-56, 84-86, 84-127
- 7:4312 The Final Incident ... 78-23, 84-75
- 7:4314 Use of the Prior Record ... 78-23, 81-52, 81-54, 84-06, 84-108, 84-127
- 7:4320 Union Officials ... 79-47, 80-170
- 7:4400 Mitigating Factors ... 78-28, 78-39, 79-46, 80-161, 82-10, 82-33, 82-37, 82-46, 82-91, 82-104, 82-107, 83-19, 83-23, 83-72, 84-40, 84-77, 84-113
- 7:4410 Employer Conduct ... 78-21, 78-28, 78-38, 79-46
- 7:4412 Provocation ... 78-28, 78-38, 80-20, 83-102
- 7:4414 Discrimination ... 78-21, 80-141, 81-32, 81-91, 82-19, 82-40, 82-48, 82-63, 82-78, 82-100, 84-03, 84-68
- 7:4416 Warnings ... 80-02, 83-77, 83-108, 84-06, 84-44, 84-90, 84-108
- 7:4420 The Employee ... 78-20, 84-06
- 7:4422 Rehabilitative Potential ... 80-02, 80-43, 80-107, 81-09, 84-06, 84-40, 84-56, 84-86, 84-90
- 7:4424 Employee's State of Mind ... 78-20, 84-87
- 7:4426 Economic Hardships ... 78-20, 84-87
- 7:4427 Compassion ... 78-20, 84-87
- 7:4428 Employment Record ... 78-20, 80-20, 81-79, 82-109, 83-52, 83-72, 83-75, 83-112, 84-24, 84-47, 84-87, 84-113
- 7:5000 Probationary Employees ... 80-147, 81-37, 81-53, 82-27
- 7:5010 Measurement of Probationary Period ... 80-152, 82-27, 83-73
- 7:5020 Standard of Review of Disciplinary Action ... 79-24, 80-23, 81-37, 82-15, 83-30
- 7:7000 Discharge Distinguished ... 78-07
- 7:7100 Resignation ... 78-07, 79-59, 80-37, 80-39, 82-53, 82-97, 83-72
- 7:7200 Retirement ... 82-21
- 7:7400 Termination of Operations ... 83-73

8 - COMPENSATION

- 8:0000 Introduction ... 81-113
- 8:1000 Entitlement to Wages ... 78-02, 78-08, 79-08, 79-56, 81-101, 82-71, 82-74, 83-38, 83-39, 83-74, 83-78, 84-07, 84-33, 84-124
- 8:1100 Equal Pay for Equal Work ... 83-38
- 8:1200 Wage Guarantees ... 78-08, 79-08, 82-71, 82-74, 84-29
- 8:1300 Retroactivity ... 80-96, 82-88
- 8:1400 Alteration of Wages ... 83-41, 83-91, 83-92, 84-07, 84-29, 84-53, 84-124
- 8:1410 Overpayment ... 80-88, 81-89

8:1420 Withholding Wages ... 81-96, 83-95, 84-101
8:2000 Premium Rates and Bonuses ... 78-22, 78-43, 79-52, 82-50
8:2100 Overtime ... 78-22, 78-43, 79-52, 80-25, 80-175, 81-72, 81-74, 82-04,
82-23, 82-43, 82-67, 82-111, 83-82, 83-111, 84-126
8:2110 Daily Overtime ... 78-43, 79-52, 80-175, 83-68, 83-115
8:2120 Weekly Overtime ... 78-22, 82-67, 83-65, 83-97
8:2130 Overtime Work ... 79-40, 80-125, 82-23, 82-44, 83-87, 83-94, 84-01,
84-37, 84-91
8:2200 Incentive Rates ... 81-102, 82-10
8:2220 Setting the Rate ... 81-118
8:2310 Merit Increases ... 84-81
8:2320 Progressive Wage Increases ... 81-93, 83-46, 84-130
8:2330 Educational or Experiential Increments ... 82-88, 84-81
8:2400 Cost of Living Allowance ... 81-87
8:3000 Fringe Benefits ... 78-29, 78-32, 78-43, 84-08
8:3100 Holiday Pay ... 81-73, 81-109, 82-11, 84-65, 84-103
8:3110 Payment for Holidays Falling on Non-Working Days ... 80-33, 80-49,
83-43, 84-103
8:3120 Qualifying for Holiday Pay: Qualifying Days ... 78-03, 79-14, 80-174,
82-111, 83-34, 83-105, 84-103
8:3122 Absence Caused by Lay-Off ... 83-34, 83-105, 84-103
8:3123 Absence Owing to Illness ... 80-174
8:3130 Performing Work on Statutory Holiday ... 79-44, 80-126, 81-19, 82-11,
82-111, 84-82, 84-105
8:3140 Holiday Pay and Other Benefits ... 80-137, 81-55, 83-21
8:3200 Vacation Benefits ... 78-29, 78-32, 84-28
8:3210 Purpose and Entitlement ... 79-21, 79-61, 81-60
8:3220 Credited Service for Vacations ... 78-32, 79-61, 80-80, 81-56, 84-34,
84-84
8:3230 Computation of Vacation and Vacation Pay ... 78-32, 79-61, 81-15,
81-56, 81-59, 81-108, 82-98, 83-24, 84-11, 84-34, 84-84
8:3240 Scheduling Vacations ... 80-90, 80-110, 80-130, 83-86
8:3250 Vacations and Other Benefits ... 79-42, 79-61, 80-13, 82-110, 82-113,
83-33
8:3300 Illness: Benefits and Other Rights ... 78-13, 78-14, 78-29, 79-42,
82-25, 82-26, 83-91, 84-73, 84-102
8:3310 Payment of Medical Premiums ... 80-27, 80-49, 82-45, 83-63
8:3320 Qualifying for Medical and Disability Benefits ... 78-13, 79-60,
80-56, 80-123, 80-148, 81-61, 82-110, 83-69, 83-116, 84-09, 84-117,
84-119
8:3330 Multiple Benefits ... 81-89, 83-21
8:3340 Entitlement to a Job ... 78-14, 80-136, 80-155, 81-78, 84-36
8:3342 Proof of Recovery ... 78-14, 80-104, 82-96, 84-125
8:3400 Call-In Pay ... 78-43, 81-02, 81-05, 81-11, 81-55, 82-49
8:3410 Purpose and Entitlement ... 78-43
8:3510 Purpose and Entitlement ... 80-41
8:3530 Duration ... 83-59
8:3700 Paid Breaks ... 80-24, 81-49, 81-64, 83-44, 83-61
8:3800 Severance Pay ... 84-56
8:4100 Safety Equipment ... 83-102, 84-97

9 - UNION RIGHTS AND LIABILITIES

9:1000 Union Rights ... 78-47, 80-21
9:1100 Recognition ... 79-58, 80-24
9:1200 Union Security ... 78-47, 79-39, 80-09, 80-22, 80-42, 80-62, 80-135,
82-02, 82-38, 82-45, 82-66, 82-89, 82-92, 82-116, 83-11, 83-45,
84-42, 84-49, 84-70, 84-95
9:1300 Grievance Procedure ... 79-32, 80-57
9:1400 Union Business on Company Time ... 83-51, 84-94, 84-129
9:1500 Union Officers ... 79-47
9:1520 Promotional Opportunities ... 78-18
9:2000 Union Liability ... 81-115, 84-53
9:2100 Strikes and Lockouts ... 82-58, 83-113
9:2210 Rights Under the Agreement ... 83-24
9:2400 Liability for an Unlawful Strike ... 79-47, 82-47
9:2410 Employees ... 79-47, 80-73, 80-87, 80-93, 80-141, 82-100
9:2420 Union Officials ... 79-47, 80-73, 80-87, 80-141
9:2430 Union ... 81-110
9:2434 Vicarious Responsibility ... 81-92
9:2500 Damages ... 82-47